Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1995

CSX TRANSPORTATION, INC., and
MONROE COUNTY, INDIANA,

Petitioners,

v.

JANET FRITSCH, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party may successfully petition for judicial review of an agency refusal to reopen an administratively final decision, when the motion to reopen is predicated upon allegations of material error, notwithstanding this Court's holding to the contrary in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987).

2. Whether the rule (declared in *Brotherhood of Locomotive Engineers*) requiring that judicial review be sought within 60 days of final agency action, as provided in 28 U.S.C. § 2344, is subject to an enormous loophole where a member of the public claims that the only notice he received was the customary *Federal Register* notice, which is the same kind of notice on which federal agencies otherwise rely to trigger rights of participation and review.

3. Whether ICC's construction of the Revised Interstate Commerce Act as authorizing it to retain jurisdiction over a rail corridor for the 180 days provided in a post-abandonment public use condition issued pursuant to 49 U.S.C. § 10906 is now incorrect, notwithstanding reliance by the parties on that consistently held, judicially supported construction.

PARTIES TO THE PROCEEDING PER SUPREME COURT RULES 14.1(B) & 29.1

Parties-respondent before the court of appeals were Monroe County (a legal subdivision of the State of Indiana), CSX Transportation Inc., Monroe County Parks and Recreation Department (an agency of Monroe County), and the Interstate Commerce Commission. Rails to Trails Conservancy was an amicus curiae on the side of the parties-respondent.

Parties-petitioner before the court of appeals were Janet Fritsch, Norman & Mary Lee Deckard, John L. Edgeworth, Franklin A. Andrew, Carol A. Daniels, Dennis Clark, Jack and Deanna Waterford, William & Rose Wampler, Delma & Anna Turner, Devin & Nikii McKamey, Brenda Flynn, Walter C. and Sara J. Anstead, Victor Oolitic Stone Company, Inc. and Indian Creek Land Company, Inc.

Pursuant to Supreme Court Rule 29.1, CSX Transportation, Inc. provides the following disclosure:

CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation, which has shares outstanding in the hands of the public. CSX Transportation, Inc. has the following affiliated companies which have shares outstanding in the hands of the public: Allegheny and Western Railway Company, The Baltimore and Cumberland Valley Rail Road Extension Company, The Central Railroad Company of South Carolina, The Cincinnati Inter-Terminal Railroad

Company, The Cleveland Terminal & Valley Railroad Company, Dayton and Michigan Railroad Company, and The Home Avenue Railroad Company.

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No. 95-___

In The
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October Term, 1995

CSX TRANSPORTATION, INC. and
MONROE COUNTY, INDIANA,

Petitioners,

v.

JANET FRITSCH, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CSX Transportation, Inc. and Monroe County, Indiana, intervenor-respondents below, respectively petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 59 F.3d 248 (D.C. Cir. 1995), and is reproduced as Appendix (App.) 1a-13a. The order denying rehearing (App. 16a) is unreported. The initial order of the Interstate Commerce Commission (ICC) issuing a Notice of Exemption (App. 18a-20a) was published in the Federal Register on February 16, 1993. By decision served March 22, 1993 (App. 41a), ICC issued a public use condition pursuant to 49 U.S.C. § 10906. By decision served September 27, 1993 (App. 21a - 24a), ICC issued a Notice of Interim Trail Use ("NITU"). By decision served October 20, 1993 (App. 25a - 27a), ICC denied various protests to the NITU. By decision served March 22, 1994 (App. 28a - 36a), ICC denied further reconsideration.

JURISDICTION

The U.S. Court of Appeals for the D.C. Circuit entered its judgment on July 18, 1995, and denied a timely rehearing request on September 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2344 provides, in relevant part, that "[o]n entry of a final order ..., [the ICC] shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. ..."

49 U.S.C. § 10906 provides, in relevant part, that

> [w]hen [the ICC authorizes abandonment or discontinuance], the Commission shall find further whether the rail properties that are involved in the proposed abandonment or discontinuance are suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

STATEMENT

In its decision below, the U.S. Court of Appeals for the D.C. Circuit claimed jurisdiction over an ICC refusal to reopen a final administrative proceeding where the motion to reopen was based on grounds of "material error." The court of appeals decision thus conflicts directly with *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), in which this Court held that the courts of appeal lack jurisdiction over such refusals to reopen.

The D.C. Circuit sought to avoid this direct conflict with *ICC v. Brotherhood of Locomotive Engineers*, by asserting an exception to the doctrine of repose where the person seeking to reopen allegedly failed to receive actual notice of the contested order, despite the fact that all individuals and entities received constructive notice of the administrative proceeding in the *Federal Register* (as well as newspaper notice) and declined to become parties. This aspect of the decision conflicts directly with the Ninth Circuit's decision in *Friends of Sierra Railroad v. ICC*, 881 F.2d 663 (9th Cir. 1989), *cert. denied sub nom., Tuolumne Park and Recreation District v. ICC*, 493 U.S. 1093 (1990). In *Friends of Sierra Railroad*, the Ninth Circuit held that Federal Register notice of an ICC rail abandonment proceeding is sufficient and binds the world, such that judicial review based on material error is foreclosed pursuant to *ICC v. Brotherhood of Locomotive Engineers*, unless the petition is filed within 60 days of the final order for which review is sought.

On the merits, the D.C. Circuit determined that, because the railroad had "abandoned" the line during the period in which a post-abandonment "public use condition" was in effect, ICC lacked jurisdiction to issue an order preserving the line for future rail service through railbanking/interim trail use, pursuant to Section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d). This aspect of the panel's decision directly conflicts with this Court's determination that ICC retains jurisdiction, where, as here, ICC "attaches postabandonment conditions" to its certificate of abandonment. *Hayfield Northern R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633 (1984).

The relevant statutes and the proceedings below will be summarized insofar as germane to these issues.

A. Statutory and Regulatory Framework

ICC has exclusive and plenary authority over discontinuance of service on, or abandonment of, freight railroad lines under the Revised Interstate Commerce Act. *See* 49 U.S.C. § 10903-04.[1] ICC administers numerous statutes bearing on post-abandonment authorization relief. For example, under 49 U.S.C. § 10905, ICC is authorized to compel transfer of lines authorized for abandonment for continued rail use. Under 49 U.S.C. § 10906, ICC must determine if a line authorized for abandonment is suitable for alternative public uses, and, if so, that statute expressly authorizes ICC to establish "public use conditions" for up to 180 days post-abandonment in order to foster such use. Further, under section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d), ICC is required to issue an order authorizing interim trail use rather than abandonment of a

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[1] *See also Colorado v. United States*, 271 U.S. 153 (1926); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). As this Petition for Certiorari is written, legislation is pending in a House-Senate Conference Committee to abolish the ICC. The House and Senate versions of the legislation both preserve exclusive and plenary federal authority over freight rail abandonments, basically transferring ICC's jurisdiction in this regard to a new agency within the U.S. Department of Transportation. *See* House Report 104-311 (Nov. 6, 1995); Senate Report 104-176 (Nov. 21, 1995). Rail abandonment regulation with regard to all issues presented in this Petition is thus expected to continue largely unchanged except for the name of the agency.

corridor where a railroad and a third party reach an agreement to preserve the corridor for possible future rail reactivation ("railbanking").[2]

49 U.S.C. § 10505 authorizes ICC to grant exemptions from aspects of its regulation. Pursuant to § 10505, ICC adopted a special regulation, published at 49 C.F.R. § 1152.50, governing abandonments of rail lines which have not been used for local traffic for at least two years. Under § 1152.50, a carrier seeking abandonment authority files a "notice of exemption" with the ICC, with service on specified officials, including state and local officials. ICC automatically publishes the "notice" in the *Federal Register* twenty days later. The *Federal Register* notice authorizes the abandonment, subject to motions for reconsideration, and to subsequent imposition of environmental, historic preservation, public use conditions, railbanking/trail use conditions and so forth. Notice of decisions imposing such conditions is served on all parties to the proceeding pursuant to 49 C.F.R. § 1150.52(d)(5).[3]

ICC's "environmental" regulations also require local newspaper notice of "exempt" abandonments under 49

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[2] The constitutionality of 16 U.S.C. § 1247(d) as implemented by ICC was affirmed by this Court in *Preseault v. ICC*, 494 U.S. 1 (1990).

[3] ICC's two-year out of service class exemption regulation (49 C.F.R. § 1152.50), was upheld, including in terms of sufficiency of notice, in *Illinois Commerce Commission v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

C.F.R. § 1152.50. *See* 49 C.F.R. §1105.12.[4] The newspaper notice is found in an Appendix to §1105.12. That notice explains how interested individuals can file and serve comments, and provides information in the event of questions relating to the proceeding.

Under ICC procedures, ICC will revoke the "notice of exempt abandonment" and instead issue a "Notice of Interim Trail Use" ("NITU") under 16 U.S.C. § 1247(d) when a railroad consents to negotiate a trail use/railbanking agreement with a qualified party. ICC's regulations indicate that the agency will entertain late-filed requests for trail use/railbanking, or late decisions by the railroad to consent to the issuance of trail use/railbanking order, so long as the Commission possesses jurisdiction to do so. *See Supplemental Trails Act Procedures*, 4 I.C.C.2d 152, 158 (1987).

Under ICC regulations, motions or petitions to reconsider a decision must be filed no later than 20 days from a final order.[5] Barring a timely motion for

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[4] General environmental statutes such as the National Environmental Policy Act, 42 U.S.C. § 4321, et seq., and section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, are applicable to rail abandonment proceedings, including "exempt" rail abandonment proceedings.

[5] Under 49 C.F.R. § 1011.2(a)(7) (made applicable pursuant to 49 C.F.R. § 1152.25(e)(1)(iv)), parties seeking further review of decisions issuing NITU's must appeal or move within ten days of service. To the extent § 1011.2(a)(7) is not applicable, ICC's more general reconsideration provision, 49 C.F.R. § 1115.3(e), applies. This provision affords parties 20 days in which to seek further review

reconsideration, an order is final. ICC is authorized to reconsider its decisions, and to reopen a proceeding, under 49 U.S.C. § 10327(g).

Judicial review of ICC final orders is governed by 28 U.S.C. § 2321 and the Hobbs Act, codified at 28 U.S.C. §§ 2341, et seq. As germane here, 28 U.S.C. § 2344 provides that an aggrieved part must file a petition for review of an ICC final order within 60 days of service or publication of the order as provided in ICC rules.

B. Proceeding before the ICC

Because the railroad line at issue here had not been employed for local traffic for more than two years, CSX Transportation, Inc. (CSX) filed a "notice of exemption" pursuant to 49 C.F.R. § 1152.50 for authority to abandon approximately 22.5 miles of rail corridor (Milepost Q-222.5 near Bloomington to Milepost Q-245.0 at Bedford) in Monroe and Lawrence Counties. The notice was served on all parties for whom service was required under ICC regulations. ICC issued a Notice of Exemption, which was published in the Federal Register on February 16, 1993. App. 18a. The notice was effective 30 days later (i.e., on March 18, 1993), but ICC specifically retained jurisdiction to modify the order in response to timely requests for a public use condition or trail use/railbanking orders. *Id.*

Monroe County timely sought issuance of "interim trail use/railbanking" order pursuant to 16 U.S.C. § 1247(d)

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of an ICC order.

and 49 C.F.R. § 1152.29, as well as a public use condition barring disposal of property interests (other than rail and ties) in the corridor pending negotiations for acquisition of the corridor for public use. CSX initially opposed issuance of a interim trail use condition. However, pursuant to an order served March 22, 1993, ICC imposed a 180-day public use condition under 49 U.S.C. § 10906. App. 41a.

While the public use condition was in effect, CSX advised ICC by letter filed March 29, 1993 that it had exercised abandonment authority on March 19, 1993. The parties then began negotiations for the transfer of the corridor during the interval of the public use condition. Prior to expiration of the 180-day public use condition, CSX moved ICC to reopen the proceeding in order to issue a Notice of Interim Trail Use (NITU) in lieu of a certificate of abandonment, pursuant to 16 U.S.C. § 1247(d). CSX served all parties to the proceeding. No party responded, except Monroe County, which filed a letter supporting the issuance of a NITU. Both CSX and Monroe County argued that ICC retained jurisdiction to act by reason of the public use condition.

By decision served September 27, 1993, ICC reopened the proceeding to issue a NITU, allowing the parties sixty days to negotiate a railbanking agreement for the 11.64 mile segment of the line in Monroe County. App. 21a. The Commission expressly found that it retained jurisdiction to issue the NITU by reason of the public use condition, notwithstanding CSX's letter filed March 29 indicating a March 19 abandonment. ICC explained that "CSX [Transportation] legally could not fully abandon the

line until expiration of the 180-day public use condition and the [railroad's] March 29 letter-filing was, in effect, notification that it had discontinued operations." App. 23a. During the 60-day NITU negotiation period, CSX and Monroe County completed negotiations and railbanked the 11.64-mile corridor.

Under ICC regulations, the agency will serve a "notice or decision on all parties ... if use of [a notice of exempt abandonment] is made subject to environmental, energy, historic preservation, public use and/or interim trial use and rail banking conditions." 49 C.F.R. § 1152.50(d)(5). According to ICC records, 98 parties or representatives of parties accordingly received service by U.S. Mail of the September 27, 1993 decision issuing the NITU.

Several members of the public, including Victor Oolitic Stone Company (one of the petitioners below) immediately filed letter-protests. However, these letters were not served on the railroad and otherwise failed to meet requirements for timely motions of reconsideration. ICC served an order on October 20, 1993 treating the letter protests as correspondence. App. 25a.

On November 8, 1993, over 40 days after the September 27, 1993 order issuing the NITU, Victor Oolitic Stone Company, et al., filed and served a "Motion to Reconsider Decision and Notice of Interim Trail Use or Abandonment." App. 37a. ICC denied the "motion to reconsider" by a decision served March 22, 1994. App. 28a. The Commission expressly found that it had

jurisdiction, explaining that it retained jurisdiction over the corridor until the completion of all post-abandonment conditions, quoting its earlier decision. App. 34a.

Victor Oolitic Stone Company and Janet Fritsch, et al., then petitioned for review of the March 22, 1994, refusal to reopen the proceeding in the D.C. Circuit.

C. Proceedings Before the Court of Appeals

Arguing that Victor Oolitic Stone Company and Ms. Fritsch, et al. were seeking review of a denial of a motion to reopen for material error, CSX and Monroe County contended that the court of appeals lacked jurisdiction over the appeal pursuant to *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), and *Friends of Sierra Railroad v. ICC*, 881 F.2d 663 (9th Cir. 1989), *cert. denied sub nom., Tuolumne Park and Recreation District v. ICC*, 493 U.S. 1093 (1990). ICC also joined in that contention at oral argument. The court of appeals, while recognizing that the question "may be a close one," nonetheless found that it had appellate jurisdiction. App. 9a.

Turning to the merits, ICC, CSX and Monroe County all contended ICC retained jurisdiction to impose the NITU. The court of appeals recognized that ICC imposed a public use condition for the express purpose of preserving jurisdiction to keep the corridor intact. In the words of the court of appeals, the Commission

> "did impose a public use condition under section 10906 purporting to stay the disposition of property

> for 180 days .... The Commission imposed this condition to attempt to allow [Monroe County] and CSX time to negotiate...."

App. 4a. The court of appeals ruled, however, that ICC cannot rely on § 10906 to retain jurisdiction over a corridor post-abandonment.

ICC, CSX and Monroe County sought rehearing and rehearing in banc. This was denied on September 18, 1995. App. 16a.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Jurisdictional Holding Conflicts with This Court's Decision in *Brotherhood of Locomotive Engineers (BLE)* and with the Numerous Decisions Upholding the Adequacy of Federal Register Notice in the Context of Federal Administrative Proceedings

A. The Jurisdictional Holding Conflicts with *BLE*

In *ICC v. Brotherhood of Locomotive Engineers*, this Court explained that the courts of appeals lack jurisdiction to review agency refusals to reopen administratively final decisions when the ground for reopening is a based on a claim of material error. "[W]here no new data but only 'material error' has been put forward as the basis for reopening, an appeal places before the courts precisely the same substance that could have been brought there by appeal

from the original order." 482 U.S. at 279. This Court explained that allowing petitions for review of agency refusals to reopen in those circumstances would be contrary to the Hobbs Act's 60-day limitation provision (28 U.S.C. § 2344) governing court of appeals jurisdiction to review final orders. *Id.* at 280.[6] Instead, courts may review agency refusals to reopen only if the reopening was based on "new evidence" or "changed circumstances." *Id.* at 284.

In their "motion to reconsider" filed with the ICC on November 8, 1993, Victor Oolitic Stone Company, Ms. Fritsch, and the other petitioning parties asserted only that ICC erred in issuing the September 27, 1993 NITU based on their view that ICC lost jurisdiction over the corridor on March 19, 1993. App. 38a-39a.[7] Because the "motion to reconsider" was filed over 40 days after the September 27 NITU, the motion was thus not timely under ICC rules. Therefore, as the court of appeals correctly recognized, it was an out-of-time motion to reopen. App. 8a. In its

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[6] This Court added that "[i]t is irrelevant that the Commission's order refusing reconsideration discussed the merits of the [petitioners'] claims at length. Where the Commission's formal disposition is to deny reconsideration, and where it makes no alteration in the underlying order, we will not undertake an inquiry into whether reconsideration 'in fact' has occurred...." 482 U.S. at 282.

[7] The Victor Oolitic/Fritsch motion argued only that "CSX abandoned its common carrier obligations in the railroad corridor on or about March 19, 1993..." This was as clear an argument based on "material error" as could be imagined, and involved neither new evidence or changed circumstance. On its face, it alluded to the condition of the line months before ICC's decision of September 27, 1993.

decision served March 22, 1994, refusing to reconsider, ICC reiterated without change its September 27, 1993 order issuing the NITU; indeed, ICC quoted from this order. App. 34a.

Thus, the ICC's decision was in effect a refusal to reopen a final administrative proceeding based on "material error," appeals of which are governed by the rule of repose in *ICC v. Brotherhood of Locomotive Engineers*. The court of appeals decision accepting jurisdiction therefore squarely conflicts with this Court's ruling in *ICC v. Brotherhood of Locomotive Engineers*. *See also Friends of Sierra R.R. v. ICC*, 881 F.2d at 666 ("subsequent unsuccessful petition to an agency to reopen cannot create a new final order giving [the] court jurisdiction over an untimely petition for review").

B. The Jurisdictional Ruling Confounds Reliance on Federal Register Notice and Directly Conflicts with *Friends of Sierra Railroad*

To justify its failure to apply *Brotherhood of Locomotive Engineers* below, the court of appeals suggested that Victor Oolitic/Fritsch, et al., claimed not to be aware that ICC had issued the Notice of Interim Trail Use via the decision served September 27, 1993. The court of appeals suggested that this alleged lack of notice constituted "new evidence" justifying judicial review. App. 7a-8a.

The alleged "new evidence" was not "new" at all. ICC complied, as did the railroad, with all notice

requirements specified in ICC's regulations (judicially upheld[8]) governing notice in rail abandonment proceedings. ICC had published notice of the proceeding in the *Federal Register*. CSX had published newspaper notice and served all required parties, not only with its original notice, but also with its motion to reopen to publish the NITU. ICC served notice of the NITU on 98 parties who had indicated an interest in participating in the proceeding. Moreover, the alleged "new evidence" regarding the insufficiency notice did not bear on the merits of whether ICC had jurisdiction below; it was presented merely as an excuse for late-filing.

Heretofore, *Federal Register* notice of federal agency proceedings has been viewed as legally sufficient notice to the world. *See, e.g.*, 44 U.S.C. § 1507; *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) (regulations binding "regardless of actual knowledge ... or hardship resulting from innocent ignorance"); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *North Alabama Express, Inc. v. United States*, 585 F.2d 783, 787 n.2 (5th Cir. 1978). The D.C. Circuit decision is thus a sharp departure from a plethora of past decisions, including some of its own decisions in the railroad regulatory context. *See, e.g., CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1031-32 (D.C. Cir. 1986) (major purpose of Staggers Act reforms is to eliminate prior notice and hearing requirements; *Federal Register* notice is sufficient in "exempt" cases under 49 U.S.C. § 10505).

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[8] *See Illinois Commerce Commission v. ICC, supra.*

Moreover, the Ninth Circuit considered the sufficiency of *Federal Register* notice in the context of an identical 49 C.F.R. § 1152.50 rail abandonment proceeding. In *Friends of Sierra Railroad v. ICC*, 881 F.2d 663 (9th Cir. 1989), *cert. denied sub. nom. Tuolumne Park and Recreation District v. ICC*, 493 U.S. 1093 (1990), ICC authorized, through publication in the *Federal Register*, an exempt abandonment pursuant to 49 C.F.R. § 1152.50. After the abandonment was completely effective, a local agency, joined by an excursion rail group, petitioned ICC to reopen the proceeding (after the time for petitions for reconsideration had expired) on the basis of a variety of errors. ICC denied reopening in an extensive decision, and then declined reconsideration of that denial in a second extensive decision. The local agency and excursion group petitioned for judicial review, contending that lack of notice excused their failure to seek review of the original ICC decision. The agency and the excursion rail group both claimed lack of actual notice of the ICC proceeding.

The Ninth Circuit observed that ICC not only had provided all persons with notice whom its regulations required to be notified, but also provided notice of the proceeding in the *Federal Register*. "Publication in the Federal Register," according to the Ninth Circuit,

> "is legally sufficient notice to all interested or affected parties regardless of actual knowledge or hardship resulting from ignorance."

881 F.2d at 667-68. Because *Federal Register* notice "was plainly sufficient to provide notice to all interested persons

of the abandonment proceeding" the Ninth Circuit held that alleged lack of notice did not constitute any grounds to overcome the principle of repose set forth in this Court's *BLE* decision. *Id.* at 668

In short, the Ninth Circuit holding is precisely the opposite of the D.C. Circuit holding.

Since the decision in *Friends of Sierra R.R. v. ICC*, ICC altered its regulations to provide for notice in addition to that which existed at the time *Friends* was decided. Under ICC's amended regulations, notices of an exemption proceeding are now published not only in the *Federal Register* but also in local newspapers. *See* 49 C.F.R. § 1105.12.[9] The public is told how it may participate in the abandonment proceeding, and its comments are invited on issues such as trail use.[10]

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[9] Section 1105.12 provides as follows:

> "In every abandonment exemption case, the applicant shall publish in a newspaper of general circulation in each county in which the line is located and certify to the Commission that it has done this by the date its notice of ... exemption is filed. The notice shall alert the public to the proposed abandonment, to available reuse alternatives, such as trail use and public use, and to how it may participate in a Commission proceeding. Sample newspaper notices are provided in the Appendix to this section for guidance to the railroads."

[10] The newspaper notice explains how to file and serve comments (with addresses of the Commission and the railroad's representative), the topics to be addressed, and provides a telephone number to call at the Commission for questions and assistance.

In addition, as provided in ICC's applicable regulations (*e.g.*, 49 C.F.R. § 1150.50(d)(5), ICC served its September 27 NITU decision on all persons who had expressed any interest in the proceeding; namely, 98 individuals by U.S. Mail, the great majority of whom were located in the Bloomington or Bedford areas. As a result, the record demonstrates that the NITU was widely known, and at least one of the Victor Oolitic/Fritsch, et al. parties had actual notice of the September 27 NITU decision on the very day it was served.[11] In short, the court of appeals erred not only as a matter of law, but as a matter of fact on notice issues.

C. The Jurisdictional Issue Is Important

This Court has already recognized the importance of the question concerning the reviewability of agency denials of petitions to reopen when this Court accepted for review *Brotherhood of Locomotive Engineers*. The decision of the court of appeals below effectively eviscerates the ruling in that case. If the approach of the D.C. Circuit were now adopted, virtually any member of the public could obtain review of agency orders long final on any allegation of error merely by filing a petition to reopen or reconsider, awaiting denial, and then petitioning for judicial review based on alleged inadequacy of *Federal Register* notice. This totally

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[11] A number of persons filed letters protesting the NITU on the same day or shortly after its issuance. *See* App. 26a (discussing filings). These filings illustrate that there was "widespread actual public knowledge" of the NITU at the time of its issuance. *See CMC Real Estate Corp. v. ICC*, 807 F.2d at 1025.

upsets the finality of agency decisions, and undercuts the intent of Congress in adopting the 60-day time limitation on judicial review of agency orders embodied in 28 U.S.C. § 2344.

Equally important, the D.C. Circuit decision below casts doubt on federal agency reliance on *Federal Register* notice of proceedings. Unless corrected, this will be highly disruptive of agency procedures across the government. No issue will be final, for interested individuals or entities can either hang back for a "second bite" at the apple by not responding to the initial *Federal Register* notice, or, if they did participate, by shopping for an entity that did not participate and prompt it to attack the otherwise final result through a petition to reopen, based on the alleged inadequacy of *Federal Register* notice.

II. The Court of Appeals' Substantive Re-interpretation of ICC Jurisdiction Is Inconsistent with this Court's Construction in *Hayfield Northern*, Inconsistent with Consistent Past Agency Practice, and Eviscerates § 10906

The court of appeals' treatment of 49 U.S.C. § 10906 likewise conflicts with other decisions and is in error. Unquestionably ICC's jurisdiction terminates when a railroad consummates an otherwise unconditioned abandonment

authorization.[12] However, ICC enjoys broad power to condition abandonments as the agency sees fit to safeguard the public convenience and necessity.[13] ICC has consistently maintained that it retains jurisdiction when it imposes appropriate post-abandonment conditions, such as historic preservation conditions or public use conditions.[14] This Court, in discussing ICC jurisdiction, has explained that although ICC jurisdiction ordinarily terminates upon abandonment, that jurisdiction survives where ICC "attaches postabandonment conditions." *Hayfield Northern*, 467 U.S at 633. So long as ICC retains jurisdiction over a rail corridor, it preempts state regulation to the contrary. *Chicago & N.W. T. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 309 (1981); *Colorado v. United States*, 271 U.S. 311 (1926).

The court of appeals below recognized that ICC "impose[d] a public use condition under section 10906 purporting to stay the disposition of property for 180 days .... The Commission imposed this condition to attempt to allow [Monroe County] and CSX time to negotiate...." App. 4a. Unquestionably then, ICC imposed a condition with the intent of retaining jurisdiction. The court of appeals

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[12] *E.g.*, *Illinois Central Gulf Railroad Co. -- Abandonment -- in Dewitt and Piatt Counties*, AB-43 (Sub-no. 134), served Jan. 4, 1989 (no jurisdiction where unconditioned abandonment is consummated).

[13] *E.g.*, *Consolidated Rail Corp. v. ICC*, 29 F.3d 706, 714 (D.C. Cir. 1994); *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973).

[14] *E.g.*, *Burlington Northern Railroad Co. -- Abandonment Exemption -- in Fall River and Custer Counties, SD*, AB-6 (Sub-no. 293X), served Feb. 9, 1989.

held that ICC lacked authority to do so. This conflicts with this Court's recognition, since *Colorado v. United States* decided in 1926, that ICC authority over abandonments is plenary and preempts all state regulation to the contrary. Furthermore, it flies in the face of this Court's recognition in *Hayfield Northern* that ICC retains jurisdiction where it imposes conditions for that purpose.

On the merits, the D.C. Circuit erred. ICC has consistently interpreted its authorizing statute to permit it to retain jurisdiction over a rail corridor for the duration of any conditions placed on an abandonment authorization pertaining to that corridor. Under *Chevron v. NRDC*, 467 U.S. 837, 842-45 (1984), a federal agency enjoys broad discretion in interpreting its statute. The question is only whether ICC's construction is "permissible." Further, a court must defer to ICC's construction of "terms of art" in the administration of these statutes. *Pennsylvania PUC v. U.S.*, 812 F.2d 8, 12 (D.C. Cir. 1987). Deference is especially due where, as here, the agency construction is long-standing and the regulated industry has come to rely upon it.[15] The court of appeals below failed to give ICC's long-standing practice any deference, thus conflicting with cases such as *Chevron v. NRDC*, *supra*, and *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 512, 543 (1978)

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[15] *NLRB v. Bell Aerospace*, 416 U.S. 267, 274-75 (1974) (if the construction is longstanding, it is considered more authoritative because those who have had matters before the agency have come to rely upon it); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (similar). *See also Mr. Sprout, Inc. v. U.S.*, 8 F.3d 118, 122 (2d Cir. 1993) (agency must explain in more detail a departure from previous interpretation).

(courts not to engraft additional procedural requirements absent compelling circumstances).

The court of appeals argued that nothing in § 10906 "explicitly or implicitly [] refers to the staying of an abandonment during the 180-day period." The court of appeals sets up a kind of straw man. ICC did not purport to "stay" the abandonment in the sense of precluding the railroad from stopping common carrier service and commencing salvage operations. Instead, ICC uses conditions to retain jurisdiction over a corridor further to protect the public convenience and necessity.

The language of 49 U.S.C. § 10906 is broad enough to contemplate an order which maintains ICC jurisdiction but permits cessation of service. The statute expressly indicates that the agency can bar transfer, lease, sale or any other disposition of the property, and take action to ensure that the property is made available for public use on "reasonable terms."[16] Clearly the language of § 10906 is sufficient to

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[16] In its decision below, the court of appeals claims that CSX only owned easements in the line which reverted to adjacent landowners upon abandonment. App. 2a, 9a. ICC did not consider the nature of the property interests held by CSX in the corridor, and those interests were not litigated before ICC or the court of appeals. The court of appeals had no basis whatsoever to assume that CSX held the corridor only by easement, or that any easements in this case "revert" upon abandonment. Since these are state law issues rather than federal issues, CSX and Monroe County have not petitioned this Court for certiorari on this wholly unsupported aspect of the court of appeals' decision. Nonetheless, CSX and Monroe County disagree with the court of appeals unsupported statements in this regard. The issue is, however, not germane to the issues here presented.

render "permissible" ICC's construction that it retains jurisdiction over a corridor for the duration of a public use condition under § 10906 pertaining to the corridor. Moreover, this construction is reasonable: a § 10906 "public use" condition is less burdensome to a railroad than a full "stay" of an abandonment authorization, for the railroad during the 180-day "public use condition" period may cease service and commence salvage operations. In addition to imposing less burden on the railroad, a § 10906 condition is no more burdensome to any other interested entity than a full stay. ICC's use of § 10906 is thus consistent with Congress' overall intent to loosen "the vise grip of regulation" on the rail industry. *CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1031 (D.C. Cir. 1986).

ICC's construction of the statute is also supported by the legislative history of § 10906. Prior to adoption of § 10906, ICC took the position that the "public convenience and necessity" standard for abandonments was broad enough to permit the agency to condition abandonments so as to permit preservation of corridors.[17] Cognizant of the

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[17] For example, in the early 1970's, Burlington Northern (BN) sought to abandon a rail line in Seattle, which numerous local groups sought to preserve as a trail. ICC issued an order barring BN from transferring the line, for other than a public purpose, for a period following the effective date of the abandonment. *Burlington Northern -- Abandonment -- Fremont & Kenmore, King County, WA*, 342 I.C.C. 446 (1972). ICC subsequently amended the order to provide for mandatory arbitration of terms and conditions of transfer. *Burlington Northern -- Abandonment-- Fremont & Kenmore*, ICC Fin. Dkt. 26638, served April 14, 1973 (unpublished). The line became Seattle's Burke-Gilman Trail.

popularity of this objective, Washington's Senator Magnuson and Indiana's Senator Hartke proposed legislation to encourage the conversion of otherwise to-be-abandoned railroad rights-of-way to public trail use.[18] ICC was supportive, testifying that

> The Commission has long taken the position that its power ... to condition abandonment approvals enables it to impose conditions designed to enhance public uses of abandoned rail properties.[19]

The Commission recommended a "more forceful provision,"[20] specifically proposing legislation which

> would go farther toward serving a valid public-interest goal, and would in essence require the Commission to take steps which are presently discretionary.[21]

Under the Commission's language, which with further strengthening became § 10906, ICC is required to issue "terms and conditions" to foster public use for rail lines suitable for those purposes. Those terms and conditions

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[18] S. 1879, *reprinted in Railroads -- 1975 -- Part 2, Hearings before the Senate Comm. on Commerce*, 94th Cong., 1st Sess. at 528-33 (1975) ("1975 Hearings").

[19] 1975 Hearings, *supra*, at 687 (ICC Chairman Stafford).

[20] 1975 Hearings at 680.

[21] 1975 Hearings at 679.

could include orders barring sales, leases, exchanges or other dispositions of property in the corridor for up to 180 days post-abandonment, unless the properties were first offered on reasonable terms for public use.[22] In sum, the legislative history clearly indicates an intent to supply ICC with sufficient jurisdiction under 49 U.S.C. § 10906 to hold a corridor intact for possible public use for 180 days post-abandonment.

As Congress has eased rail abandonment procedures since the mid-1970's in order to foster more competitive conditions within, and the economic viability of, the railroad industry, Congress has recognized that more rail corridors will be abandoned. Upon abandonment, these corridors are frequently swiftly broken up, and once lost, are extremely difficult to reassemble. Viewing rail corridors as national assets, which may be needed again in the future, Congress has equipped ICC with a number of means to foster preservation of those facilities, where such can be accomplished without unduly burdening the railroad industry. 49 U.S.C. § 10906 is one of the statutes which Congress has adopted for this important purpose.[23]

After the court of appeals' ruling below, it is difficult to see what is left of 49 U.S.C. § 10906. Under the D.C. Circuit ruling, once a railroad declares a line abandoned, a § 10906 public use condition is ineffective to preserve ICC

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[22] 1975 Hearings at 679.

[23] *See Glosemeyer v. Missouri-K-T R.R.*, 685 F. Supp. 1108, 1113-17 (E.D. Mo. 1988), *aff'd*, 879 F.2d 316, 318 (8th Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

jurisdiction for any of the 180 day post-abandonment period to which the statute is applicable. The statute becomes a dead letter, and ICC's basic alternative to preserve re-use options is the heavy-handed step of "staying" the entire abandonment. Hamstringing federal rail abandonment regulation in this fashion makes no sense. The question is important, and merits review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 18, 1995

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 11, 1995 Decided July 18, 1995

No. 94-1403

JANET FRITSCH, ET AL.,
PETITIONERS
v.
INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

MONROE COUNTY, A LEGAL SUBDIVISION OF THE
STATE OF INDIANA, ET AL.,
INTERVENORS

On Petition for Review of an Order of the
Interstate Commerce Commission

Nels J. Ackerson argued the cause and filed the briefs for petitioners. *M. Roy Goldberg* entered an appearance.

Evelyn G. Kitay, Attorney, Interstate Commerce Commission argued the cause for respondents. *Henri F. Rush,*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

General Counsel, *Louis Mackall, V,* Attorney, and *Jeffrey P, Kehne,* Attorney, United States Department of Justice, were on the brief for respondents. *J. Carol Williams,* Attorney, United States Department of Justice, entered an appearance for respondents.

Charles H. Montange argued the cause for intervenors and *amicus curiae.* With him on the joint brief was *Charles M. Rosenberger* for intervenor CSX Transportation, Inc., and *Andrea Ferster for amicus curiae* Rails to Trails Conservancy.

Before SILBERMAN, SENTELLE, and HENDERSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge:* Petitioners are various private landowners who own in fee simple the land across which CSX Transportation, Inc. ("CSX") possessed an easement for rail purposes. Petitioners challenge a decision of the Interstate Commerce Commission ("ICC" or "Commission") holding that CSX was legally unable to fully abandon its rail line until expiration of a 180-day public use condition attached to the Commission's decision authorizing abandonment, pursuant to 49 U.S.C. § 10906 (1994). During this 180-day period, CSX and the Monroe County Parks and Recreation Department ("MCPRD") had reached an agreement where the MCPRD would acquire a portion of the rail corridor for trail use under the Trails Act, 16 U.S.C.§ 1241 *et seq.* (1994). The Commission claimed that because CSX was unable to abandon the rail line during that period, the Commission retained jurisdiction to implement the Trails Act, and that as a result, petitioners' reversionary interest could

not vest. We hold that section 10906 did not prevent CSX from consummating abandonment, and thus the Commission retained no jurisdiction to implement the Trails Act.

I. BACKGROUND

On January 25, 1993, CSX filed a Notice of Exemption with the ICC, seeking authorization to abandon a rail line that it once had operated between Bloomington and Bedford, Indiana. The rail line had been out of service since 1987. The proposed consummation date of the abandonment was March 19,1993. On February 1, 1993, pursuant to 49 U.S.C. § 10906, the MCPRD filed a request with the ICC for a public use condition to give it additional time to negotiate for acquisition of the rail line for trail purposes. Section 10906 imposes a waiting period on the railroad, preventing it from selling or otherwise disposing of its private property while offers are made to the railroad by those interested in making public use of the property. *Id.* The MCPRD also notified the ICC of its intention to file a statement of willingness to assume financial responsibility, as required by section 1247 of the Trails Act, 16 U.S.C. § 1247. In accordance with the ICC's procedures under 49 C.F.R. § 1152.50 (1994), the Commission served a notice of exemption authorizing abandonment on February 16, 1993, effective 30 days later. The exemption provided that "[e]nvironmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision."

On March 5, 1993, CSX requested additional time to determine whether it would negotiate a trails-use agreement in light of the substantial number of letters it received both

for and against the trail. Local landowners opposing the conversion of the rail line to trail use wrote the ICC, enclosing copies of the deeds to their land and asserting CSX did not own the land in fee simple, but rather only possessed easements over the land for purposes of the rail line. Proponents of the conversion also wrote the ICC, maintaining that the imposition of a public use condition under section 10906 would prevent the extinguishment of the easements under Indiana law. On March 16, 1993, CSX informed the Commission it had decided not to negotiate an agreement for conversion.

On March 18, the Commission issued a decision permitting the abandonment, while denying the MCPRD's request for interim trail use under section 1247 because the railroad did not consent, as was required under the statute. However, the Commission did impose a public use condition under section 10906, purporting to stay the disposition of the property for 180 days as an alternative to a section 1247 rails-to-trails conversion. The Commission imposed this condition in an attempt to allow MCPRD and CSX time to negotiate the issue of conversion.

By letter dated March 23, CSX wrote to the ICC that it had abandoned the line on March 19. On April 23, 1993, CSX wrote to the ICC again, emphasizing the legal need for CSX's consent to a rails-to-trails conversion. CSX also repeated that it had abandoned the line on March 19.

On September 10, 1993, MCPRD wrote to the ICC, stating that CSX and MCPRD had reached an agreement to the effect that MCPRD would acquire a portion of the rail

corridor for trail use.[1] On September 14, the day the public use condition expired, CSX filed a motion confirming MCPRD's position, and asked the Commission to reopen the abandonment proceeding to issue a Notice of Interim Trail Use under the Trails Act, 16 U.S.C. § 1247(d). CSX also reaffirmed that it had abandoned the rail line on March 19.

The Commission issued a decision on September 23, 1993, agreeing to reopen the proceeding, and imposing the condition for interim trail use. The Commission explained that:

> [CSX] legally could not fully abandon the line until expiration of the 180-day public use condition and the [CSX] March 29 letter-filing was, in effect, notification that it had discontinued operations. . . . As there is no evidence in the record of any intent to consummate full abandonment, the Commission retains jurisdiction to implement the Trails Act as requested by [CSX] and MCPRD.

On November 8, 1993, petitioner landowners filed a motion to reconsider the Commission's decision, which they supplemented on December 8. Petitioners argued that CSX abandoned its common carrier obligations on March 19, 1993, by virtue of filing a letter with the Commission, discontinuing rail service, and removing all track materials and communication equipment. Consequently, the Commission no longer possessed jurisdiction to impose a trail condition.

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[1] CSX received $90,000.00 for its change of heart.

The Commission issued its decision on March 22, 1994, denying reconsideration and affirming its prior decision that it retained jurisdiction to impose a trails-use condition. Petitioners subsequently filed a petition for review of this denial of reconsideration with this court on May 19, 1994.

II. DISCUSSION

As a threshold issue, the intervenors[2] argue we lack jurisdiction to review this petition for review. Under 28 U.S.C. § 2344 (1994), a party seeking to challenge a final ICC order must file a petition for review within 60 days of entry of that order. The petition before us, filed May 19, 1994, is thus untimely for purposes of judicial review of the September 1993 Commission decision. On November 8, 1993, however, petitioners filed a "Motion to Reconsider Decision and Notice of Interim Trail Use and Abandonment." The Commission denied this motion in a decision served March 22, 1994. This petition for review is directed at that decision.

The Commission has established procedures for timely reconsideration of decisions in rail abandonment proceedings. Under 49 C.F.R. § 1115.3(e), a party has twenty days from the service date of a decision to seek reconsideration. The Commission also has discretion under section 1115.3(e) to extend the twenty day period an additional twenty days. In the proceedings below, petitioners did not seek reconsideration within the twenty-day period nor the additional twenty-day discretionary period. On November 8, petitioners did file what they termed a motion for reconsideration. However, this

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[2] The intervenors include, among others, CSX and MCPRD on behalf of the ICC.

was clearly outside the time established under the regulations. Consequently, according to the intervenors, this motion amounted to a motion to reopen an administratively final decision.

The intervenors assert that this court's jurisdiction to review agency refusals to reopen administratively final decisions is limited by *ICC v. Brotherhood of Locomotive Eng'rs,* 482 U.S. 270 (1987). They contend that, under *Locomotive Engineers,* petitions for review of final agency action cannot circumvent the sixty-day limitation by filing a motion to reopen, and then petitioning for review of the motion's denial. They maintain that, under *Locomotive Engineers,* judicial review of the merits of the original agency action is not available where agency reconsideration was sought solely for material error. *See Locomotive Engineers,* 482 U.S. at 281-82. Courts may only review a refusal to reopen if a party sought reopening on the basis of new evidence or changed circumstances. *Id.* at 284.

Intervenors posit that the motion to reopen filed below presented no changed circumstances or new evidence not known or available when the September, 1993 decision was issued. Petitioners' motion for reconsideration alleged only that the ICC erred in finding that it had jurisdiction to impose a trails condition. According to intervenors, the Commission had already addressed all issues presented by petitioners in its September decision.

While we agree that, under *Locomotive Engineers,* a refusal to reopen a proceeding for material error will not support a petition to review the merits of the original agency decision, we conclude that the Commission was in fact

presented with new material accompanying the motion to reopen.[3] Specifically, petitioners asserted before the Commission that they were denied the opportunity to submit protests, arguing that CSX's request to reopen the proceeding was made beyond the Commission's procedural deadlines to file protests, and that petitioners were unaware of the filing of the CSX motion. Not only did the Commission not reject petitioners' assertions of new matter, it in fact addressed anew the merits of the September 23 determination as though accepting the facial validity of petitioners' claims and rejecting them only on the underlying merits. While it is true that the Supreme Court held in *Locomotive Engineers* that the bare fact that "the Commission's order refusing reconsideration discussed the merits of the [movants'] claims at length," does not render a denial of reconsideration reviewable on the merits of the underlying decision, 482 U.S. at 280, it is also true that *Locomotive Engineers* recognized the reviewability of "refusals 'based upon new evidence or changed circumstances' rather than upon 'material error.'" *Id.* at 281 (citation to concurrence omitted).

We therefore interpret *Locomotive Engineers* as permitting merits review of a refusal to reopen where the motion to reopen was based on non-pretextual grounds of new matter or changed circumstances, and not merely on material error in the original agency decision. We do not read *Locomotive Engineers* to hold or imply the absolute bar suggested by

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[3] Intervenors make much of the distinction between motions for reconsideration and motions to reopen administratively final decisions. However, the Supreme Court in *Locomotive Engineers* did not base its holding on any such distinction, and thus, neither do we.

intervenors. If there were such an absolute bar, one can conceive of a whole parade of horribles headed by a circumstance in which a party totally deprived of due process in an original agency petition could never obtain review of the merits although he never learned, actively or constructively, of the proceedings to deprive him of his rights until after the expiration of the sixty-day review period. Although the question may be a close one, we conclude that the present petition falls in the reviewable new-matter category rather than in the non-reviewable material-error category.

Turning to the merits, the ICC argues that the imposition of a public use condition pursuant to section 10906 prevents a railroad, which has received a decision authorizing abandonment, from abandoning a line for 180 days. Specifically, the ICC maintains that CSX was unable to abandon its line for 180 days, beginning March 18, 1993, the date the ICC imposed the public use condition at issue. As a result, CSX's property rights could not revert to the private landowners who own the land across which the rail line was built during that period. Thus, regardless of CSX's actual intent to abandon the line on March 19, 1993, CSX was legally bound to wait the full 180 days. The ICC contends that because CSX reached an agreement with Monroe County within the 180-day period concerning the conversion of part of the rail line for trail use, CSX reversed its prior intent to abandon the line. Consequently, the ICC could legally reopen the proceedings and issue a notice of interim trail use under Trails Act section 1247(d), 16 U.S.C. § 1247(d).

We reject the ICC's application of section 10906, and hold that the imposition of a public use condition did not prevent CSX from fully abandoning the rail line on March 19,

1993. Section 10906, titled "Offering abandoned rail properties for sale for public purposes," states:

> When the Interstate Commerce Commission finds under section 10903 of this title that the . . . public convenience and necessity require or permit abandonment or discontinuance, the Commission shall find further whether the rail properties that are involved . . . are suitable for use for public purposes. . . . If the Commission finds [such properties are so suitable], the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. *The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless such properties have first been offered, on reasonable terms, for sale for public purposes.*

49 U.S.C. § 10906 (emphasis added).[4] Nothing in this language, explicitly or implicitly, refers to the staying of an abandonment during the 180-day period. This section simply states that pursuant to a 180-day public use condition, an entity cannot dispose of its rail property during the 180-day period unless the entity has first offered the property, upon reasonable terms, for sale for public purposes. Notwith-

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[4] In their brief, petitioners inexplicably rely on an outdated version of this provision enacted in 1976, 49 U.S.C. § 1a(10), and amended to its present form in 1978. While the specific language relied on by petitioners is worded differently than in the current version, the differences in language are irrelevant for the disposition of this case. Nevertheless, we have higher expectations of counsel appearing before us.

standing such a sale, the statute prevents the disposition of any assets remaining after abandonment during the 180-day period. However, once a railroad consummates abandonment of a bare easement, the railroad no longer possesses any property interests to transfer. Such is the case here, where CSX only possessed an easement on property belonging to private landowners. Once CSX consummated abandonment, CSX's property interests reverted to the landowners. These interests were thus extinguished as a matter of law. Certainly neither section 10906 nor the Trails Act can create a new property interest if abandonment has already occurred.

No doubt exists that abandonment had in fact occurred in this case. No traffic had moved across the rail line since 1987. In January, 1993, CSX filed a notice of exemption with the ICC, asserting "the proposed consummation date of the abandonment is March 19, 1993." On March 23, CSX notified the Commission that it had in fact abandoned the line on March 19, reiterating its position on both April 23 and September 14, 1993. In addition, CSX had removed all track materials as well as signal and communication lines and poles.

The ICC has stated that its jurisdiction over a line terminates when the line is completely abandoned, and "whether a line is fully abandoned is a question of the carrier's intent." *Illinois Cent. Gulf R.R. Co.—Abandonment—in DeWitt and Pratt Counties, IL,* 5 I.C.C.2d 1054, 1061 (1988). In determining intent, the ICC asserted that it looked to whether tariffs had been cancelled and operations had ceased. *Id.* CSX's intent could not have been clearer in this case, based on the letters it sent to the ICC, as well as its removal of equipment.

The ICC maintains, however, that *Illinois Cent. Gulf R.R.* is inapposite because that case involved the dismissal of a petition seeking a trails-use condition when the railroad had already consummated an unconditioned grant of abandonment authority issued by the Commission. In contrast, the ICC imposed a public use condition in the decision permitting CSX to abandon the rail line in the case at bar. The ICC relies on *Preseault v. ICC* for the proposition that its jurisdiction over railroad property terminates only when an *unconditioned* abandonment has been consummated. 494 U.S. 1, 5-6 n.3 (1990).

We disagree. The Supreme Court in *Presault* only stated that "[o]nce a carrier 'abandons' a rail line pursuant to authority granted by the [ICC], the line is no longer part of the national transportation system, and although the Commission is empowered to impose conditions on abandonments, ... as a general proposition ICC jurisdiction terminates." *Id.* In the present case, the Commission did not impose any condition on the abandonment by CSX as such that would prevent the reversion of the property interest to the petitioners. The only condition in the order reads as follows:

> The exemption is subject to the condition that [CSX] leave intact all bridges, culverts, and similar structures (but not track or track materials) for a period of 180 days unless the property is first offered, on reasonable terms, for sale for public purposes.

Nothing in the condition recites a limitation on the ability of CSX to effect an abandonment. On March 23, when CSX announced by letter to the Commission that it had "abandoned this line of railroad effective March 19, 1993," there was no

condition that prevented it from doing so. The Commission offers no other reason why this case falls outside the general rule of terminated jurisdiction stated in *Presault*. And we hold that it had no jurisdiction to undo the abandonment and impose conditions thereon. Because we so hold, we need not decide whether Indiana State property law would dictate that a change of use in an easement would constitute an additional taking of the property of the fee owner, nor whether such additional taking would be compensable under the Fifth Amendment to the United States Constitution. *See Preseault* 494 U.S. at 4 ("[E]ven if the rails-to-trails statute gives rise to a taking, compensation is available to petitioners under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1982 ed.)"). Those questions are left for another day. Sufficient unto this day is the decision that the easement holder had abandoned its interest and the fee owners prevailed.

III. CONCLUSION

For the foregoing reasons, we conclude that we have jurisdiction to review the ICC's decision. We further conclude that the ICC was without power to undo the abandonment of the CSX line; that the abandonment had worked a reversion of interest to the fee simple; and that the petition for review is therefore allowed and the decision of the Commission reversed.

It is so ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1403

Janet Fritsch, et al.,
Petitioners

v.

Interstate Commerce Commission and
United States of America,
Respondents

Monroe County, a legal subdivision
of the State of Indiana, et al.,
Intervenors

MANDATE

Pursuant to the provisions of Fed. R. App. Pro. 49(a).
ISSUED: 9/26/95

BY: /s/ E. Brown, Deputy Clerk

Before: SILBERMAN, SENTELLE and HENDERSON, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Interstate Commerce Commission and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the petition for review is granted, in accordance with the opinion of the court filed herein this date.

FOR THE COURT:

Mark J. Langer, Clerk
By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: July 18, 1995
Opinion for the Court filed by Circuit Judge Sentelle.

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1995
No. 94-1403
Filed Sep 18 1995

Janet Fritsch, et al.,

Petitioners,

v.

United States of America
and Interstate Commerce Commission,

Respondents

BEFORE: Silberman, Sentelle and Henderson, Circuit Judges.

ORDER

Upon consideration of the petitions for rehearing of respondents and intervenors, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1995
No. 94-1403
Filed Sep 18 1995

Janet Fritsch, et al.,

Petitioners,

v.

United States of America
and Interstate Commerce Commission,

Respondents

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of the Suggestions for Rehearing *In Banc* of respondents and intervenors, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX C

INTERSTATE COMMERCE COMMISSION
NOTICE OF EXEMPTION
[Docket No. AB-55 (Sub-No. 455X)]
CSX TRANSPORTATION, INC.—
ABANDONMENT EXEMPTION—
IN MONROE AND LAWRENCE COUNTIES, IN

Service Date: February 16, 1993

CSX Transportation, Inc. (CSXT) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonment* to abandon its approximately 22.5-mile rail line between milepost Q-222.5 at Bloomington and milepost Q-245.0 at Bedford, in Monroe and Lawrence Counties, IN.

CSXT has certified that: (1) no local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period. CSXT also has certified that the requirement at 49 CFR 1152.50(d)(1) (notice to government agencies) has been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on March 18, 1993, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27 (c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29[3] must be filed by February 26, 1993. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by March 8, 1993, with:

Office of the Secretary
Case Control Branch
Interstate Commerce Commission
Washington, DC 20423

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[1] A stay will be issued routinely by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Commission's Section of Energy and Environment in its independent investigation) cannot be made before the effective date of the notice of exemption. *See exemption of Out-of-Service Rail Lines*, 5 I.C.C. 2d 377 (1989). Any entity seeking a stay involving environmental concerns is encouraged to filed its request as soon as possible in order to permit this Commission to review and act on the request before the effective date of this exemption.

[2] *See Exempt. of Rail Abandonment-Offers of Finan. Assist.*, 4 I.C.C. 2d 164 (1987).

[3] The Commission will accept a late-filed trail use request as long as it retains jurisdiction to do so.

A copy of any pleading filed with the Commission should be sent to applicant's representative:

Charles M. Rosenberger
500 Water Street J150
Jacksonville, FL 32202

If the notice of exemption contains false or misleading information, the exemption is void *ab initio*.

Applicant has filed an environmental report which addresses the abandonment's effects, if any, on the environmental and historic resources. The Section of Energy and Environment (SEE) will issue an environmental assessment (EA) by February 19, 1993. Interested persons may obtain a copy of the EA by writing to SEE (Room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Chief of SEE, at (202) 927-6248. Comments on environmental and historic preservation matters must be filed within 15 days after the EA is available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: February 1, 1993

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

[Docket No. AB-55 (Sub-No. 455X)]

CSX TRANSPORTATION, INC.—
ABANDONMENT EXEMPTION—
IN MONROE AND LAWRENCE COUNTIES, IN

Decided: September 23, 1993
Service Date: September 27, 1993

CSX Transportation, Inc. (CSXT), filed a verified notice under 49 CFR 1152 Subpart F-*Exempt Abandonments* to abandon a 22.5-mile rail line between milepost Q-222.5 at Bloomington and milepost Q-245.0 at Bedford, in Monroe and Lawrence Counties, IN. A notice of exemption was served and published in the *Federal Register* (58 FR 8635-36) on February 16, 1993. The exemption became effective March 18, 1993.

On February 3, 1993, the Monroe County Parks and Recreation Department (MCPRD) filed a request for a public use condition under 49 U.S.C. 10906 and 49 CFR 1152.28 covering the entire involved line. On February 12, 1993, MCPRD filed a request for interim trail use/rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, including a statement of willingness to assume financial responsibility, again for the entire line. By letter filed March 17, 1993, CSXT declined to negotiate a trail use agreement.

As an alternative to interim trail use under the National Trails System Act (Trails Act), the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10906. The Trails Act is interpreted as being strictly voluntary on the part of the abandoning railroad. Because CSXT had declined to negotiate a trail use agreement and MCPRD had made the requisite showing for a public use condition, by decision served March 22, 1993, the Commission denied the trail use request but imposed a 180-day public use condition on the entire line.

By letter filed March 29, 1993, CSXT informed the Commission that the involved line had been "abandoned" effective March 19, 1993—1 day after the exemption became effective.

By motion filed September 14, 1993, CSXT requested that this proceeding be reopened and that the Commission issue a notice of interim trail use (NITU), not to exceed 60 days, for that segment of rail corridor in Monroe County. CSXT assertedly has been negotiating with MCPRD under the public use condition for the sale of that segment. On September 14, 1993, MCPRD submitted a letter supporting the CSXT motion.

The Commission retains jurisdiction to implement the Trails Act so long as the abandonment has not been consummated and the abandoning railroad is willing to negotiate. Here, the only issue is whether CSXT consummated the abandonment. On March 29, 1993, when CSXT filed its letter notifying the Commission that it had abandoned the line on March 19, 1993, CSXT was, by its own admission, negotiating with MCPRD under the public

use condition. In any event, CSXT legally could not fully abandon the line until expiration of the 180-day public use condition and the CSXT March 29 letter-filing was, in effect, notification that it had discontinued operations. Docket No. AB-174 (Sub-No. 2X), *The Central Vermont Railway, Inc.—Abandonment Exemption—In Franklin County, VT* (not printed), served October 18, 1990. As there is no evidence in the record of any intent to consummate full abandonment, the Commission retains jurisdiction to implement the Trails Act as requested by CSXT and MCPRD.

Accordingly, the proceeding will be reopened and the notice of exemption modified to the extent necessary to implement interim trail use/rail banking on the 11.64-mile segment of line between milepost Q-222.5 at Bloomington and milepost Q-234.14 at Monroe/Lawrence County Line. The parties may negotiate an agreement during the 60-day period prescribed below.

It is ordered:

1. This proceeding is reopened.

2. The notice of exemption published in the *Federal Register* on February 16, 1993, exempting the abandonment of the above-described rail line, is modified to the extent necessary to implement interim trail use/rail banking on that 11.64-mile segment between milepost Q-222.5 at Bloomington and milepost Q-234.14 at Monroe/Lawrence County Line.

3. CSXT may discontinue service, cancel tariffs for the line on not less than 10 days' notice to the Commission, and salvage track and related materials consistent with interim trail use/rail banking after the effective date of this decision

and notice. Tariff cancellations must refer to this decision and notice by date and docket number.

4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and the payment of any taxes imposed on the right-of-way.

5. Interim trail use/rail banking is subject to the future restoration of rail service.

6. If the user intends to terminate trail use, it must send the Commission a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached by the 60th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by the 60th day, CSXT may fully abandon the line.

8. This decision is effective on its service date.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

[Docket No. AB-55 (Sub-No. 455X)]

CSX TRANSPORTATION, INC.—
ABANDONMENT EXEMPTION—
IN MONROE AND LAWRENCE COUNTIES, IN

Decided: October 15, 1993
Service Date: October 20, 1993

CSX Transportation, Inc. (CSXT), filed a notice for an exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its 22.5-mile rail line between milepost Q-222.5 at Bloomington and milepost Q-245.0 at Bedford, in Monroe and Lawrence Counties, IN. A notice of exemption was served and published in the *Federal Register* on February 16, 1993 (58 FR 8635-36). The exemption became effective March 18, 1993.

By decision served March 22, 1993, the Director of the Office of Proceedings, in disposing of requests made by the Monroe County Parks and Recreation Department (MCPRD), denied a request for issuance of a notice of interim trail use (NITU) because CSXT had declined to negotiate a trail use agreement, but granted a request for the imposition of a public use condition. The public use condition expired on September 14, 1993 (the 180th day after the effective date of the exemption).

By motion filed September 14, 1993, CSXT requested that this proceeding be reopened and that the Commission issue, under 16 U.S.C. 1247(d) (Trails Act), an NITU for the

section of the rail corridor in Monroe County. On September 14, 1993, MCPRD submitted a letter supporting the CSXT motion. By decision and notice of interim trails use or abandonment, dated September 23, 1993, and served September 27, 1993, the Director of the Office of Proceedings, reopened the proceeding and modified the exemption to the extent necessary to implement interim trail use/rail banking on that segment of the involved line within Monroe County.

By substantially identical letters dated September 26, 27, 28, or 29, 1993, each styled "Protest for Reasons of Public Safety," and tendered for filing at the Commission by facsimile (FAX) transmission and/or the United States Postal Service on dates extending from September 27, 1993, through October 5, 1993, various firms[1] concerned with the quarrying and fabrication of limestone in the vicinity of the involved right-of-way, express opposition to the NITU. None of the letter-protests includes a certificate showing simultaneous service upon all parties to the proceeding (see 49 CFR 1104.12) or states in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances, or includes a request that the Commission make such a determination (see 49 CFR 1115.4).

Because the letter-protests did not comply with the requirements of 49 CFR 1104.12, they will be treated as correspondence in this docket. It should be noted, however, that substantively the "protests" appear to have little merit. In

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[1] Victor Oolitic Stone Co; Independent Limestone Company; B.G. Hoadley Quarries Inc.; Moon Freight Lines, Inc.; Fluck Limestone Co., Inc.; Reed Quarries, Inc.; Indiana Limestone Institute of America, Inc.; and the Star Stone Co., Inc.

Finance Docket No. 30724 (Sub-No. 1), *Wisconsin and Calumet Railroad Company. Inc.—Notice of Interim Trail Use and Termination of Modified Certificate* (not printed), served September 29, 1993, the Commission recently emphasized that its authority under the Trails Act is very limited because the trails use program is voluntary and consensual between the railroad and the trails user. The Commission's jurisdiction is essentially ministerial and its discretion extends to determining only whether the Trails Act has been properly invoked and the trails user's statutory requirements regarding rail banking and the trail user's assumption of managerial responsibility have been met. *Id.*

The procedural irregularity noted, the failure to supply a copy of the protest to the railroad is sufficient to warrant this treatment of the letter-protests, rather than disposition of them on the merits. Any attempt to refile the letters as pleadings should be in compliance with the rules with respect to petitions to reopen and service of pleadings.

It is ordered:

1. The letter-protests tendered for filing in this proceeding by Victor Oolitic Stone Co.; Independent Limestone Company; B.G. Hoadley Quarries Inc.; Moon Freight Lines, Inc.; Fluck Limestone Co., Inc.; Reed Quarries, Inc.; Indiana Limestone Institute of America, Inc.; and the Star Stone Co., Inc., are accepted as correspondence.

2. This decision is effective on its service date.

By the Commission, Sidney L. Strickland, Jr., Secretary.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

[Docket No. AB-55 (Sub-No. 455X)]

CSX TRANSPORTATION, INC.—
ABANDONMENT EXEMPTION—
IN MONROE AND LAWRENCE COUNTIES, IN

Decided: March 14, 1994
Service Date: March 22, 1994

CSX Transportation, Inc. (CSXT), filed a notice for an exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its 22.5–mile rail line between milepost Q–222.5 at Bloomington and milepost Q–245.0 at Bedford, in Monroe and Lawrence Counties, IN. A notice of exemption was served and published in the *Federal Register* on February 16, 1993 (58 FR 8635–36). The exemption became effective March 18, 1993.

By decision served March 22, 1993, the Acting Director of the Office of Proceedings, in disposing of requests made by the Monroe County Parks and Recreation Department (MCPRD), denied a request for issuance of a notice of interim trail use (NITU) under the National Trails System Act (Trails Act), 16 U.S.C. 1247(d), and 49 CFR 1152.29 because CSXT had declined to negotiate a trail use agreement, but granted a request for the imposition of a public use condition under 49 U.S.C. 10906. The public use condition expired on September

14, 1993 (the 180th day after the effective date of the exemption.)[1]

By motion filed September 14, 1993, (CSXT motion) CSXT requested that this proceeding be reopened and that the Commission issue under the Trails Act a NITU for the segment of the rail corridor in Monroe County. On September 14, 1993, MCPRD filed a letter supporting the CSXT motion.[2] By decision and notice of interim trail use or abandonment, dated September 23, 1993, and served September 27, 1993, (September 27 decision), the Director of the Office of Proceedings reopened the proceeding and modified the exemption to the extent necessary to implement interim trail use/rail banking on that segment of the involved line within Monroe County.

By substantially identical letters dated September 26, 27, 28, or 29, 1993, each styled "Protest for Reasons of Public Safety," various firms,[3] concerned with the quarrying and

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[1] The decision imposing the public use condition was actually decided on March 18, 1993, the day the exemption was to become effective, thus making the exemption subject to the condition from the outset.

[2] The filings on September 14 were by facsimile (FAX) transmission. The originals were filed subsequently with the Commission. See the notice in *Acceptance of Mail Via FAX* (not printed), served and published December 22, 1989 (54 FR 52857), which provides that FAX transmission may be used for a Commission filing when submission is required on short notice.

[3] Victor Oolitic Stone Co; Independent Limestone Company; B.G. Hoadley Quarries Inc.; Moon Freight Lines, Inc.; Fluck Limestone Co., Inc.; Reed Quarries, Inc.; Indiana Limestone Institute of America,

fabrication of limestone in the vicinity of the involved right-of-way, expressed opposition to the NITU. By decision served October 20, 1993 (October 20 decision), the Secretary indicated that the letter-protests would not be considered on the merits because they did not comply with the requirements of 49 CFR 1104.12, and indicated they would be treated as correspondence.

On November 8, 1993, Victor Oolitic Stone Company, Inc., and a number of other named members of a purported "class" of owners of property adjacent to the rail corridor in Monroe County (Property Owners or petitioners) filed a motion to reconsider the September 27 decision. Petitioners assert that they have been denied the opportunity to submit their protests before the Commission, arguing that CSXT's request to reopen the proceeding and the execution of the purchase Offer/Contract were performed outside the Commission's procedural deadlines to file protests and that petitioners were unaware of the filing of the CSXT motion. Petitioners assert further that they object to the transfer of the right-of-way until MCPRD complies with Federal, state, and local land use regulations. They contend that CSX abandoned its common carrier obligations in the railroad corridor on or about March 19, 1993, by virtue of filing a letter with the Commission, discontinuing rail service, and subsequently re-

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Inc.; and the Star Stone Co., Inc., were the firms identified in the decision, but other firms filed similar letters. The tendered filings were made both by FAX and the United States Postal Service and duplications were involved.

moving all trackage, other track materials, and signal and communication lines and poles.[4]

On November 12, 1993, MCPRD filed a pleading in opposition to Property Owners' motion for reconsideration. According to MCPRD, petitioners offer no grounds for reconsideration but instead present a general restatement of alleged facts already presented to the Commission and to the parties. In responding to Property Owners' assertion that they have been denied an opportunity to submit protests before the Commission, MCPRD cites the October 20 decision which indicates the possibility of refiling the letters as protests. In response to petitioners' opposition to the transfer of the right-of-way, MCPRD asserts that the transfer is under the authority of and in full compliance with the NITU. MCPRD asserts further that petitioners' concern with compliance with Federal, state, and local land use regulations is misplaced. It states that petitioners do not identify any particular regulations and cites *Missouri-Kansas-Texas Railroad—Abandonment—in St. Charles, Warren, Montgomery, Callaway, Boone, Howard, Cooper and Pettis Counties, MO*, Docket No. AB-102 (Sub-No. 13) (ICC served Feb. 19, 1991), in which the Commission denied a motion to reopen and indicated that allegations of failure to comply with local or state requirements could be addressed to relevant local or states authorities. MCPRD argues also that Property Owners's motion was not timely filed as required by 49 CFR

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[4] As noted in the September 27 decision, by letter filed March 29, 1993, CSXT informed the Commission that the involved line had been "abandoned" effective March 19, 1993—1 day after the exemption became effective.

1115.3, because more than 20 days had elapsed after service of the September 27 decision.

On November 19, 1993, CSXT filed its reply to the motion for reconsideration. In response to petitioners' assertion that CSXT's request to reopen the proceeding and the execution of the purchase Offer/Contract were performed outside the Commission's procedural deadlines to file protests, CSXT cites *Burlington Northern Railroad Company—Abandonment Exemption—Rail River and Custer Counties, SD,* Docket No. AB-6 (Sub-No. 293X) (ICC served Feb. 9, 1989), asserting that the Commission has always held that it will accept late-filed Trails Act requests as long as it retains jurisdiction to do so.[5]

On December 9, 1993, counsel for Property Owners (Counsel) filed "supplemental authority to the motion to reconsider." This pleading focuses on the jurisdictional issue and asserts that the Commission did not retain jurisdiction because full abandonment had been consummated and because the September 27 decision came after the public use condition had expired, and should thus be voided. Counsel argues that, as no agreement was reached within the 180-day period, CSXT had full abandonment authority.

On December 15, 1993, MCPRD filed a motion to strike the supplemental authority pleading as contrary to Commission rules at 49 CFR 1104.13(c) disallowing a reply to a

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[5] In response to petitioners' concern about being unaware of the filing of the CSXT motion, CSXT asserts that it did in fact serve the motion on all parties of record.

reply.[6] MCPRD argues nonetheless that a public use condition was timely requested and duly imposed by the Commission. It asserts further that, during the course of the public use condition, CSXT and MCPRD negotiated a trail use and railbanking agreement and then timely requested the Commission to issue a NITU, an action for which, argues MCPRD, the Commission retained jurisdiction. In addition to its motion to strike, MCPRD included a report on the status of the railbanked facility. It stated that it had assumed management and other responsibilities for the corridor, that a railbanking agreement with CSX had been implemented under the NITU, and that MCPRD had received a grant of approximately $1 million from the Federal government's Intermodal Surface Transportation Efficiency Act's "enhancements program" to construct a trail facility on the Monroe County portion of the corridor.

DISCUSSION AND CONCLUSIONS

There are two issues to be considered in disposing of this motion for reconsideration. First, we must determine if we had jurisdiction to issue the NITU at the time of the September 27 decision. If we determine that we retained jurisdiction, we must then ascertain the extent of our involvement under the Trails Act.

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[6] MCPRD also challenges the pleading on other grounds, including the identity of the "Class of Adjacent Property Owners" represented by counsel, arguing that the Commission has never approved, identified, or certified any "class" in this proceeding. In the interests of a more complete discussion of the issues raised in opposition, we will not strike the supplemental pleading but consider it in light of MCPRD's response to it.

As noted in the September 27 decision, which addressed the exact jurisdictional issue raised by petitioners, the Commission did, and continues to, retain jurisdiction to implement the jurisdiction over an abandonment until all conditions on the abandonment have expired. The public use condition had expired neither when CSXT assertedly abandoned the line on March 19, 1993, nor when it filed its letter with the Commission on March 29, 1993, notifying the Commission of its March 19, 1993 abandonment. Thus, the Commission retained jurisdiction over the line. As the September 27 decision stated:

> The Commission retains jurisdiction to implement the Trails Act so ling as the abandonment has not been consummated and that abandoning railroad is willing to negotiate. Here, the only issue is whether CSXT consummated the abandonment. On March 29, 1993, when CSXT filed its letter notifying the Commission that it had abandoned the line on March 19, 1993, CSXT was, by its own admission, negotiating with MCPRD under the public use condition. In any event, CSXT legally could not fully abandon the line until expiration of the 180–day public use condition and the CSXT March 29 letter–filing was, in effect, notification that it had discontinued operations. Docket No. AB–174 (Sub–No. 2X), *The Central Vermont Railway, Inc.—Abandonment Exemption—In Franklin County, VT* (not printed), served October 18, 1990. As there is no evidence in the record of any intent to consummate full abandonment, the Commis-

> sion retains jurisdiction to implement the Trails Act as requested by CSXT and MCPRD.

September 27 decision, 1.

Next, we must consider the extent of our role under the Trails Act. As we stated in the October 20 decision, our authority under the Trails Act is very limited. The decision stated:

> [T]he trails use program is voluntary and consensual between the railroad and the trails user. The Commission's jurisdiction is essentially ministerial and its discretion extends to determining only whether the Trails Act has been properly invoked and the trails user's statutory requirements regarding rail banking and the trail user's assumption of managerial responsibility have been met.[7]

October 20 decision, 1-2.

A review of the record in light both previous decisions in this proceeding and of Commission precedent, leads to a conclusion that the September 27 decision properly invoked Commission jurisdiction under the Trails Act. Accordingly, we deny petitioners' motion to reconsider.

It is ordered:

1. The motion to reconsider the decision and notice of interim trail use or abandonment is denied.

2. This decision is effective on March 22, 1994.

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[7] *Citing Wisconsin and Calumet Railroad Company, Inc.—Notice of Interim Trails use and Termination of Modified Certificate,* Finance Docket No. 30724 (Sub-No. 1) (ICC served Sept. 29, 1993).

By the Commission, Chairman McDonald, Vice Chairman Phillips, Commissioners Simmons and Philbin

/s/ Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

(SEAL)

APPENDIX G

BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET NO. AB–55 (SUB. NO. 455X)

CSX TRANSPORTATION, INC. ABANDONMENT EXEMPTION IN MONROE AND LAWRENCE COUNTIES, INDIANA

MOTION TO RECONSIDER DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Petitioners, Victor Oolitic Stone Company, Inc., Norman & Mary Lee Deckard, Franklin A. Andrew, Carol A. Daniels, Dennis Clark, Jack & Deanna Waterford, William & Rose Wampler, Indian Creek Land Company, Inc., Delmer & Anna Turner, Devin & Nikki McKarney, Brenda Flynn, John L. Edgeworth, Jane Fritsch, and all others similarly situated, by counsel, as members of a Class of property owners adjacent to the CSX rail corridor in Monroe County, Indiana, request the Commission to reconsider its *Decision and Notice of Interim Trail Use or Abandonment,* issued September 23, 1993 (Service Date: September 27, 1993) and in support of this request state as follows:

(1) CSX, through its predecessors in interest acquired a right of way in Monroe County, Indiana from members of the Class and\or their predecessors in interest for the purpose of operating a railroad corridor. The right of way is legally described as follows:

> Being that portion of CSX Transportation's corridor in Monroe County, Indiana beginning at milepost 222.5 or valuation station 11746÷00 on seller's

valuation map 242, sheet 11, about 300 feet north of the centerline of County Club Road in Bloomington, Monroe County, Indiana, extending southward about 11.64 miles to milepost 234.14 or valuation station 12360+67 on seller's valuation map 242, sheet 14, at the Monroe/Lawrence County line. The corridor or premises varies in width but is generally 66 feet wide and includes approximately 18 bridges, and structures, ballast, bridge ties but excludes all trackage, other track material and signal and communication lines and poles which will be removed by seller. The premise contains about 123.501 acres as generally shown on seller's valuation maps 242, sheets 11, 12, S-12A and 14, and 247, sheets 1-3 inclusive and incorporated herein by reference.

Generally referred to as "the railroad corridor".

(2) CSX filed a *Notice of Exemption* to abandon the railroad corridor before the Interstate Commerce Commission ("ICC") on January 25, 1993. The *Notice of Exemption* became effective on March 18, 1993.

(3) The Monroe County Parks & Recreation Department ("MCPRD") submitted a request for issuance of a *Notice of Interim Trail Use* ("NITU") on February 1, 1993 and a *Statement of Willingness to Assume Financial Responsibility* on February 9, 1993. This Commission denied the MCPRD request for the interim trail use on March 22, 1993; a public use condition was granted instead which expired on September 18, 1993.

(4) CSX abandoned its common carrier obligations in the railroad corridor on or about March 19, 1993 by virtue of the

action filed with the ICC combined with its discontinuance of rail service and subsequent removal of all trackage, other than track materials and signal & communication lines and poles.

(5) CSX filed its *Motion to Reopen Proceeding* on September 14, 1993, resulting in an ICC decision allowing interim trail use for a period of sixty (60) days, during which an agreement could be negotiated between CSX and MCPRD to establish and maintain a recreational trail on the abandoned railroad corridor.

(6) A *Purchase Offer/Contract* was entered into by CSX, as Seller, and MCPRD, as Buyer, which purports to transfer the right of way, invoking the National Trails Act [16 U.S.C. 1247(d)].

(7) The procedural posture of this proceeding has effectively denied the Class of adjacent property owners the opportunity to submit their protests before this Commission. CSX's request to reopen the proceeding before this Commission and the execution of the *Purchase Offer/Contract* were performed well outside the Commission's procedural deadlines to file protests and, despite due diligence, were only recently discovered by the Class of adjacent property owners.

(8) The Class of adjacent property owners objects to the transfer of the right of way until such time as MCPRD is able to demonstrate compliance with federal, state and local land use regulations.

WHEREFORE, the Class of adjacent property owners requests that this Commission reconsider its *Decision and Notice of Interim Trail Use or Abandonment*, and allow the protests to be presented pursuant to 49 C.F.R. 1152.20.

Respectfully submitted,

/s/ Paul J. Watts
Paul J. Watts (#1137-60)

/s/ Thomas E. Densford
Thomas E. Densford (#13955-64)

Attorneys for the Class of Adjacent Property Owners

APPENDIX H

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-55 (Sub-No. 455X)]

CSX TRANSPORTATION, INC.—
ABANDONMENT EXEMPTION—
IN MONROE AND LAWRENCE COUNTIES, IN

Decided: March 18, 1993
Service Date: March 22, 1993

CSX Transportation, Inc. (CSXT), filed a notice for an exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its 22.5-mile rail line between milepost Q—222.5 at Bloomington and milepost Q—245.0 at Bedford, in Monroe and Lawrence Counties, IN. A notice of exemption was served and published in the *Federal Register* on February 16, 1993 (58 CFR 8635-36). The exemption is scheduled to become effective March 18, 1993

The Commission's Section of Energy and Environment has issued an environmental assessment indicating that the right-of-way may be suitable for other public use following abandonment. On February 3, 1993, the Monroe County Parks and Recreation Department (MCPRD) tendered comments on environmental issues. These comments embraced a request for a public use condition under 49 CFR 1152.28 and also indicated that a statement of willingness to assume financial responsibility in support of a request for a notice of interim trail use (NITU) would be filed later. That statement was filed February 12, 1993. Numerous public comments supporting and opposing the use of the right-of-way as a trail have been received by the Commission.

By letter dated March 17, 1993, CSXT declined to enter into an interim trail use agreement. Therefore, since 49 U.S.C. 1247(d) permits only voluntary interim trail use, the Commission cannot issue a NITU in this proceeding. *See Rail Abandonment—Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591 (1986) (*Trails*).

As an alternative to interim trail use under the National Trails System Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10906. *See Trails*, 2 I.C.C. 2d at 609. To justify a public use condition a party must show: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for imposition of the time period. *See* 49 CFR 1152.28(a)(2).

MCPRD has satisfied these requirements and, therefore, a 180-day public use condition will be imposed in its usual form. While it appears that CSXT may have only an easement interest in substantial portions of the right-of-way and be unable to sell such an interest for a nonrail use, in *Trails* the Commission recognized that the right-of-ways subject to public use conditions might include easements as well as property owned by the railroad. The Commission, stated:

> Section 10906 permit the Commission to order a railroad not to dispose of rail property it owns for up to 180 days after the effective date of a decision authorizing abandonment, unless the properties have been offered, on reasonable terms, for sale for public purposes. Since railroads are free to accept or decline interim trail use proposals and public use offers, there is no practical basis for refusing to permit prospective

interim trail users to invoke the public use statute when the right-of-way includes easement property and property owned by the carrier. *Id.*

One further matter requires comment. MCPRD recognizes that the Commission ordinarily restricts disposition only with respect to roadbed materials, bridges, culverts, and real estate, and allows removal of track and track materials when the proposed acquisition is for a trail or other nonrail related public use. Here MCPRD seeks some additional unspecified condition on salvage because MCPRD's ability to have control over removal of track and ties would assertedly minimize disruption to the roadbed and thus reduce the expense of rendering the roadbed suitable for trails use. MCPRD has not adequately justified the imposition of a nonroutine condition prohibiting removal of track and track materials and the public use condition will be imposed in its usual form allowing removal of such materials.

As conditioned, this action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered

1. This proceeding is reopened.
2. The request for issuance of a notice of interim trail use is denied.
3. The exemption is subject to the condition that CSXT leave intact all bridges, culverts, and similar structures (but not track or track materials) for a period of 180 days unless the property is first offered, on reasonable terms, for sale for public purposes.

4. The request for a public use condition in all other respects is denied.

5. This decision is effective on its service date.

By the Commission, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

No. 95-962

(2)

Supreme Court, U.S.
FILED
JAN 18 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

CSX TRANSPORTATION, INC. and MONROE COUNTY, INDIANA,

Petitioners,

vs.

JANET FRITSCH, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, consistent with *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), the Court of Appeals for the District of Columbia Circuit properly exercised jurisdiction to review a final ICC order in which the ICC expressly considered new evidence in ruling on a motion to reconsider.

2. Whether the ICC can reassert jurisdiction over an abandoned right-of-way, more than 180 days after issuing an abandonment order with a 180-day public use condition under 49 U.S.C. § 10906, and cause the respondent-landowners' land to be converted to a trail under the rails-to-trails provisions of 16 U.S.C. § 1247(d), even though the railroad company abandoned the line under ICC authority and railroad easements across the land were extinguished by operation of law.

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APPENDIX

Appendix A — Motion to Strike 1a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 59 F.3d 248 (D.C. Cir. 1995), and is reproduced in Petitioners' Appendix at 1a-13a (hereinafter "Pet. App."). The final order of the Interstate Commerce Commission (hereinafter "ICC") that was the subject of the proceeding below was served by the ICC on March 22, 1994, and is reproduced in Pet. App. at 28a-36a.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set out in Petitioners' Brief at 2-3, this case also involves 16 U.S.C. § 1247(d) (hereinafter the "Trails Act"), which provides in relevant part:

> (d) Interim use of railroad rights-of-way
>
> . . . . Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

STATEMENT OF THE CASE

CSX Transportation, Inc., (hereinafter "CSX") operated a rail line and had railroad right-of-way easements over land in Monroe County, Indiana that was and still is owned in fee simple by adjacent landowners, including Respondents herein.[1]

On January 25, 1993, CSX filed a Notice of Exemption with the ICC seeking authorization to abandon this line on March 19, 1993. Pet. App. at 3a. On February 1, 1993, Monroe County filed a request with the ICC for a public use condition, pursuant to 49 U.S.C. § 10906 (hereinafter "Section 10906").[2] Pet. App. at 3a. Section 10906 permits the ICC to impose a 180-day waiting period after abandonment during which the railroad may not dispose of abandoned properties that it owns which are suitable for public use unless the properties have first been offered for sale for public purposes. 49 U.S.C. § 10906.

On February 16, 1993, the ICC served a Notice of Exemption authorizing abandonment effective 30 days later. Pet. App. at 18a-19a.

---

1. Petitioner CSX, in its *Notice of Exemption*, stated that it was CSX's opinion that the properties proposed for abandonment might not be suitable for other public purposes due to the possibility of reversionary interests in the property. This representation as to CSX's lack of fee simple ownership in the property has not been challenged. "Petitioners are various private landowners who own in fee simple the land across which CSX Transportation, Inc. ("CSX") possessed an easement for rail purposes." *Fritsch v. ICC*, 59 F.3d 248, 249 (D.C. Cir. 1995), Pet. App. at 2a. If CSX actually owned the land in fee, CSX would be free to transfer its interest in the land to Monroe County, regardless of whether the Trails Act applies, and neither CSX nor Monroe County would have any reason to seek the aid of this Court.

2. The Monroe County Parks and Recreation Department, often referred to in papers and decisions as MCPRD, is a division of Monroe County.

On March 18, 1993, the ICC issued a decision allowing the abandonment, with a 180-day public use condition. Pet. App. at 41a-44a. The ICC denied Monroe County's request for interim trail use under 16 U.S.C. § 1247 because the railroad did not consent to the trail use as required by 16 U.S.C. § 1247. Pet. App. at 42a.

On March 23, 1993, and again on April 23, 1993, CSX informed the ICC that it had abandoned the rail line on March 19, 1993. Pet. App. at 4a. Tariffs were cancelled, and during the summer and fall of 1993, rails and ties were removed, hence terminating the railroad use on the land, extinguishing CSX's railroad right-of-way easement by operation of law and relieving the burden of the right-of-way easement from the owners of the fee simple estate. Pet. App. at 11a.

On September 10, 1993, Monroe County wrote to the ICC that CSX and Monroe County had reached an agreement for Monroe County to acquire a portion of the rail corridor for a cost of $90,000. No evidence was submitted that CSX at that time owned any interest in the land. Pet. App. at 4a-5a.

On September 14, 1993, the public use condition expired. On that day CSX filed a statement with the ICC affirming Monroe County's representations and requesting the ICC to reopen the abandonment proceeding to issue a Notice of Interim Trail Use (hereinafter "NITU") pursuant to the Trails Act, 16 U.S.C. § 1247(d). Pet. App. at 5a. Section 1247(d) only applies *before* abandonment and authorizes the ICC to issue a NITU to cause a line to be rail-banked and used for interim trail purposes as an alternative to abandonment. CSX again reaffirmed that it had abandoned the rail line on March 19, 1993. Pet. App. at 4a.

On September 23, 1993, the ICC reopened the proceeding and issued a NITU. Pet. App. 21a-24a.

On November 8, 1993, the Respondent-Landowners moved to reconsider the ICC's decision on the basis of new evidence, and Respondent-Landowners filed supplemental authority on December 8, 1993. Pet. App. at 37a-40a. As explained by the ICC in its subsequent ruling, the new evidence included a claim that "full abandonment had been consummated" and "no agreement was reached within the 180-day period . . ." Pet. App. at 32a.

On December 15, 1993, Monroe County filed a Motion to Strike "Supplemental Authority" Filed by "Class of Adjacent Landowners" and Notice of Status of Railbanked Facility (hereinafter "Motion to Strike and Status Report"), which contained *new evidence,* including claims that the line had not been abandoned and that Monroe County had in fact reached a trail agreement during the 180-day period, and also including a report on events and developments that had occurred after the ICC's September 27, 1993 decision. Respondents' Appendix at 1a-5a.

On March 22, 1994, the ICC issued a decision which, while reaffirming its earlier decision, effectively re-opened the proceeding by expressly considering the new evidence. Specifically, the ICC responded to Monroe County's Motion to Strike and Status Report: "In the interests of a more complete discussion of the issues raised in opposition, we will not strike the supplemental pleading but consider it in light of Monroe County's response to it." Pet. App. at 33a, n. 6. The ICC proceeded to consider Monroe County's new evidence:

> It asserts further that, during the course of the public use condition, CSXT and MCPRD negotiated a trail use and railbanking agreement and then timely requested the Commission to issue a NITU, an action for which, argues MCPRD, the Commission

> retained jurisdiction. In addition to its motion to strike, MCPRD included a report on the status of the railbanked facility. It stated that it had assumed management and other responsibilities for the corridor, that a railbanking agreement with CSX had been implemented under the NITU, and that MCPRD had received a grant of approximately $1 million from the Federal government . . . to construct a trail facility on the Monroe County portion of the corridor.

Pet. App. at 33a. After reviewing the new evidence and the earlier proceedings, the ICC ruled again that it had jurisdiction to issue a NITU. Pet. App. at 35a-36a.

On May 19, 1994, Respondent-Landowners filed a timely petition for review of this final agency order by the United States Court of Appeals for the District of Columbia Circuit (hereinafter "D.C. Circuit").

On May 11, 1995, the D.C. Circuit held that it possessed the jurisdiction to review the ICC's decision because the ICC had considered new evidence in connection with the motion for reconsideration. Pet. App. at 8a. The D.C. Circuit further held that the ICC was without power to undo the abandonment of the CSX line, that the abandonment had worked a reversion of interest to the fee simple, that the petition for review was allowed, and that the ICC's decision was reversed. Pet. App. at 13a. Petitions for reconsideration were denied. Pet. App. at 16a-17a.

On December 18, 1995, CSX and Monroe County filed their petition to this Court for a writ of certiorari. The ICC did not seek further review by this Court.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS PROPERLY EXERCISED JURISDICTION TO REVIEW THE AGENCY ORDER BECAUSE THE ICC CONSIDERED NEW EVIDENCE IN ISSUING ITS FINAL ORDER.

This Court set out the standard for judicial review of an agency decision in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278 (1987) (hereinafter *Locomotive Engineers*):

> When the Commission reopens a proceeding for any reason and, after reconsideration, issues a new and final order setting forth the rights and obligations of the parties, that order —even if it merely reaffirms the rights and obligations set forth in the original order — is reviewable on its merits . . . . Where, however, the Commission *refuses* to reopen a proceeding, what is reviewable is merely the lawfulness of the refusal.

(Citations omitted).

Respondent-Landowners in their November 8, 1993 and December 8, 1993 filings presented the ICC with new evidence. Monroe County, in its Motion to Strike and Status Report, presented new evidence of its own. The ICC explicitly declined to strike the Respondent-Landowners' Motion to Reconsider Decision and Notice of Interim Trail Use (hereinafter "Motion to Reconsider") and supplemental authority, and instead it expressly considered the new evidence that was submitted by both Respondent-Landowners' and Monroe County. The ICC's

written decision denying Respondent-Landowners' Motion to Reconsider explicitly acknowledges its consideration of the new evidence. Pet. App. at 8a.

This Court explained in *Locomotive Engineers* that if an agency in fact reconsiders a ruling, even if its new final order merely reaffirms the rights and obligations set forth in the original order, the new final order is reviewable on its merits. 482 U.S. at 278.

The argument of Petitioners here (Intervenors below) that there was no "new evidence" but only "newly raised evidence" completely ignores the evidence that Monroe County itself presented. Monroe County presented evidence of facts that occurred both before and after the ICC's September 27, 1993 order. "Newly raised evidence" is "precisely the same substance that could have been brought there by an appeal from an original order," and is therefore not reviewable. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 279 (1987). Thus, evidence that was available at the time of the original proceeding is not "new evidence." *Friends of the Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park and Recreation Dist. v. ICC*, 493 U.S. 1093 (1990). *See also Platnick Brothers, Inc. v. Norfolk & Western Railway Co.*, 367 I.C.C. 782, 785 (1983) ("in an administratively final case it is only fair that `new evidence' be in fact *new*.").

Monroe County's "new evidence" was *new*. The evidence presented to the ICC in connection with Respondent-Landowners' Motion to Reconsider and Supplemental Authority to Motion to Reconsider Decision and Notice of Interim Trail Use and Monroe County's Motion to Strike and Status Report is "new evidence" since the facts provided to the ICC concerned events that occurred after the ICC issued its original decision allowing the exemption. The ICC expressly declined to strike the "new

evidence" and acted upon it in its decision issued on March 22, 1994. Since the ICC accepted "new evidence" in connection with its March 22, 1994 order, the D.C. Circuit properly exercised jurisdiction to review that new final order.

II.

NO CONFLICT EXISTS BETWEEN CIRCUITS BECAUSE ADEQUACY OF NOTICE IS NOT AN ISSUE.

No issue whatsoever is presented by the nature or content of the *Federal Register* notice that was published in this case. Petitioners' focus on the *Federal Register* appears to be merely an effort to create the appearance of a conflict between circuits where none exists. Only if there had been no "new evidence" would there be any substance whatsoever to the farfetched contention that the D.C. Circuit's decision here somehow conflicts with the Ninth Circuit's decision in *Friends of the Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park and Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).[3]

---

3. Petitioners based their entire *Federal Register* argument on one phrase taken out of context from the D.C. Circuit's opinion, "[Landowner-Respondents] were unaware of the filing of the CSX motion." However, the D.C. Circuit did not hold that the lack of notice was the basis for reviewing the ICC decision of March 22, 1994. The D.C. Circuit considered the record in which the ICC itself acknowledged that it had considered new evidence and the D.C. Circuit explained:

> Not only did the Commission not reject [Respondent-Landowners'] assertions of new matter, it in fact addressed anew the merits of the September 23 determination as though accepting the facial validity of [Landowner-Respondents'] claims and rejected them only on the underlying merits.

Pet. App. at 8a.

Because the ICC considered new evidence and in fact re-opened the proceeding, determining the rights and obligations of the parties to the action, Respondent-Landowners' Motion To Reconsider was the subject of a new final agency decision. When the ICC ruled on that motion on March 22, 1994, Respondent-Landowners timely filed their appeal of that denial on May 19, 1994.

III.

THE COURT OF APPEALS DECISION, WHICH CORRECTLY HOLDS THAT THE ICC EXCEEDED ITS JURISDICTION IN THIS CASE BY ATTEMPTING TO APPLY THE TRAILS ACT AFTER ABANDONMENT WAS CONSUMMATED, DOES NOT LIMIT THE LAWFUL APPLICATION ELSEWHERE OF EITHER THE PUBLIC USE CONDITION OR THE RAILBANKING PROVISIONS OF THE TRAILS ACT.

The Court of Appeals decision here correctly defined the limits of the ICC's jurisdiction in this case. The Court of Appeals decision does not limit the application of the public use condition under Section 10906 of the Railroad Revitalization and Regulatory Reform Act of 1976. 49 U.S.C. § 10906. Neither does the Court of Appeals decision here limit the power of the ICC to facilitate railbanking and rails-to-trails conversions under the Trails Act.

The petition for a writ of certiorari here muddles the important differences between Section 10906 and the Trails Act. In the Trails Act, Congress provided a mechanism by which rails could be converted to trails. The Trails Act preempts state abandonment law because by federal law no abandonment is deemed to have occurred. Under the Trails Act, if *before abandonment* both the railroad and a responsible party agree to

negotiate a trail use, the ICC may issue a NITU and initiate a 180-day negotiation period to allow the railroad and would-be trail manager to come to an agreement concerning interim trail use. Through this process, a railroad right-of-way corridor may be converted to a trail, without triggering the extinguishment of railroad right-of-way easements and the consequent resumption of full dominion over the railroad corridor by the underlying landowners.

But this case did *not* proceed as a Trails Act case because, as acknowledged by the ICC and all of the parties, CSX expressly declined to participate in negotiations for such a conversion and as a result, by law, the ICC could not issue a NITU. Instead, the ICC authorized abandonment, with a public use condition. After CSX had taken all necessary steps to abandon the line and upon expiration of the public use condition, abandonment was consummated at the latest on September 14, 1994. Pet. App. at 21a, 28a, 42a. Therefore the Trails Act provisions thereafter simply could not and did not apply to this case.

The statute that *is* in issue here is Section 10906. The plain language of 10906 permits a public use condition to be effective only *after* ICC abandonment authorization. That provision does not prevent the consummation of abandonment and the consequent extinguishment of right-of-way easements by operation of law. Rather, it requires the railroad to make available for public purposes, under a procedure similar to a right of first refusal, whatever property the railroad retains that is suitable for public use. If easements are extinguished, of course, the railroad may have no land left to transfer.

The railroad right-of-way easements across Respondent-Landowners' land were extinguished upon abandonment, which occurred before the ICC's September 27 order. Thus, Respondent-Landowners' land was no longer available to CSX to

negotiate with Monroe County or anyone else. Additionally, the plain language of Section 10906 permits the ICC to impose a public use condition *"for a period not more than 180 days,"* which expired before the ICC attempted to resurrect its jurisdiction by imposing interim trail use under the Trails Act. With the expiration of the Section 10906 public use condition, the ICC's jurisdiction over the rail line expired, even if it had not expired with the earlier extinguishment of the easements. Therefore the ICC had no power to make orders concerning Respondent-Landowners' land.

ICC jurisdiction ordinarily ends with the issuance of a certificate of abandonment. *Hayfield Northern R.R. v. Chicago N.W. Transp. Co.*, 467 U.S. 622, 633 (1984). The ICC has described its test of consummation of abandonment:

> Our jurisdiction over a line typically ends when a line is fully abandoned. Whether a line is fully abandoned is a question of the carrier's intent. In determining intent, we look at certain indicia: a line is fully abandoned when a certificate of public convenience or necessity (or an exemption notice as pertinent) is issued and has become effective, tariffs have been cancelled and operations have ceased. Abandonment is considered consummated when a line is fully abandoned.

Illinois Central Gulf R.R. Co. - Abandonment - In DeWitt and Pratt Counties, IL, AB-43 (Sub.-No. 134), served Jan. 4, 1989. Clearly ICC jurisdiction ends with the consummation of abandonment. When the ICC places a public use condition on an abandonment, the ICC of course retains jurisdiction to enforce the opportunities for public entities to negotiate the purchase of

whatever property, if any, remains after abandonment. The ICC has no power to create new real property interests in the railroad.

The D.C. Circuit correctly held here that CSX had taken every step necessary to abandon, and in fact had acknowledged to the ICC on several occasions that it had abandoned the rail corridor on March 19, 1993. Abandonment was not "stayed" by the imposition of a public use condition under 49 U.S.C. § 10906. Upon abandonment, the right-of-way easements were extinguished, the Respondent-Landowners' land was no longer a part of the national transportation system, and the ICC's jurisdiction ended.

The D.C. Circuit's decision follows unmistakable and consistent precedents. There is no important legal issue for this Court to review.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — MOTION TO STRIKE

BEFORE THE INTERSTATE COMMERCE COMMISSION

AB-55 (Sub-no. 455X)

CSX Transportation, Inc. — Exemption — Monroe and Lawrence Counties, Indiana

(1) Motion to Strike "Supplemental Authority" Filed by "Class of Adjacent Land Owners" and (2) Notice of Status of Railbanked Facility

Motion to Strike

On 13 December, counsel for Monroe County (used collectively to refer to Monroe County and its Parks and Recreation Department, a party in this proceeding) received a copy of a document entitled "Supplemental Authority to Motion to Reconsider Decision and Notice of Interim Trail Use or Abandonment." Monroe County moves to strike this "Supplemental Authority" for the reasons stated below.

1. The "Supplemental Authority" amounts to a reply to a reply, and is not permitted under 49 C.F.R. 1104.13(c) ("[a] reply to a reply is not permitted"). Indeed, the "supplemental" pleading amounts not just to a second bite at the apple, but apparently an even more illicit third.

Monroe County assumes that the "Class of Adjacent Property Owners" is comprised of the entities that filed unserved "letter-protests" dated in late September 1993. These protests were disallowed by this Commission, except as correspondence, for failure to comply with ICC procedural requirements. *See* decision in this docket served October 20.

Appendix A

The attorney (Mr. Watts) serving the "Supplemental Authority" at issue here then filed a "petition to reconsider" on November 4, 1993, on behalf of certain identified persons or companies. That petition, as Monroe County pointed out in its reply served November 9, provided absolutely no grounds to reconsider.

Mr. Watts' latest emission (the "Supplemental Authority"), which was received one month after our reply was served, amounts to nothing more than a third effort at the same subject. It purports to offer some rationale for the November 4 petition to reconsider, and to fill in the gaping hole Monroe pointed out on November 9. Mr. Watts' "Supplemental" volley is thus clearly a reply to a reply, and unquestionably is not permitted by the Commission's regulations.

Mr. Watts gives no basis for the delay, or rationale for permitting its filing in contravention of this Commission's regulation, nor could he. Mr. Watts' reply to our reply offers nothing new, either factual or legal. There are simply no grounds for his failure to comply with this Commission's regulations.

2. The "Supplemental Authority" fails to identify the persons on whose behalf it is filed. The title page and unnumbered final page of the pleading states that the signatory attorney represents "Class of Adjacent Property Owners" but those property owners are not identified, and this Commission has never approved, identified or certified any "class," let alone the class specified. Attorneys filing pleadings with the Commission should identify the persons on whose behalf they are filing, so that parties to a proceeding do not have to "assume," as we have had to do, the identity of our opposition.

3. In the event that this Commission entertains Mr. Watts' third bite at the apple in contravention of 49 C.F.R. 1104.13(c), Monroe County notes that Mr. Watts on behalf of his "Class" makes a number of legal and factual misstatements. For example, this Commission has consistently recognized that it retains jurisdiction over a corridor so long as a condition on an abandonment authorization remains extant, and even if salvage activities have been undertaken. The reason is that there is not "full consummation" of the abandonment authority so long as a condition is extant. Conversely, if salvage activities have not taken place, and the corridor is otherwise intact, the Commission has also consistently taken the position that it retains jurisdiction even if the abandonment was unconditioned or the conditions imposed have expired. The reason again is lack of "full consummation."

In the case at bar, a public use condition was timely requested and duly imposed by the ICC. During the interval provided by the public use condition, CSX Transportation and Monroe County negotiated a trail use and railbanking agreement for the portion of this corridor in Monroe County, and jointly requested that this Commission enter a railbanking order. Specifically, Monroe County advised the Commission of this situation in a letter dated September 10, filed September 14, within the time provided by the public use condition. This Commission has consistently taken the position that a timely request during the period of a condition continues the Commission's jurisdiction for a period sufficient to act upon the request, even if the Commission's action is a short time outside the period of the initial condition, as here. *Compare Burlington Northern Railroad Company — Exemption — Fall River and Custer Counties, SD*, AB-6

(Sub-no. 293X), served Jan. 4, 1989 (lifting a condition barring salvage and disposal effective Feb. 3, 1989) *with* same, served Feb. 9, 1989 (issuing a NITU in response to a request by State of South Dakota "dated" January 27, 1989 — six day interval between lifting condition and imposition of section 8(d) order, although order timely requested).

As CSX Transportation's conduct here shows, the railroad during the course of a public use condition negotiated an agreement keeping the Monroe County portion of the corridor intact, which is what a public use condition is supposed to facilitate. The parties timely requested ICC to issue a NITU, in accordance with the Commission's now ancient policy of doing so "as long as we retain jurisdiction to do so." *Burlington Northern, supra,* served Feb. 9, 1989, at p. 1. The situation is controlled by cases such as *Burlington Northern.*

Illinois Central Gulf — Abandonment — De Witt and Piatt Counties, Ill., 5 ICC2d 1054 (1988), cited by Mr. Watts, is inapposite. That corridor had been authorized for abandonment, the abandonment was effective, the line had been salvaged, and there were no conditions, let alone extant conditions. Here there were conditions, the conditions were extant, and the parties actually completed an agreement while the conditions were extant.

Status of Railbanked Facility

Monroe County is pleased to report (a) that it has assumed management responsibility and other responsibilities for the corridor in question in accordance with 16 U.S.C. 1247(d), (b) that a railbanking agreement with CSX has been implemented pursuant to the NITU, and (c) that the County has received a

substantial (approximately $1 million) grant from the federal government's Intermodal Surface Transportation Efficiency Act's "enhancements program" to construct a trail facility on the Monroe County portion of the corridor.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing was served by U.S. Mail, postage pre-paid, first class, this 14th day of December, 1993, upon Paul J. Watts, Esq., 85 S. Main Street, Spencer, Indiana 47460-1787 and Charles Rosenberger, Esq., CSX Transportation, 500 Water Street, Jacksonville, Florida 32202.

s/ Charles H. Montange

Supreme Court, U.S.
FILED
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(3)

No. 95-962

In the Supreme Court of the United States

OCTOBER TERM, 1995

CSX TRANSPORTATION, INC., ET AL., PETITIONERS

v.

JANET FRITSCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly exercised jurisdiction over a petition for review of the Interstate Commerce Commission's refusal to reopen a final administrative decision.

2. Whether the court of appeals erred in holding that a railroad could effectuate an abandonment of a rail line notwithstanding the Interstate Commerce Commission's imposition of a public use condition for a 180-day period.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 59 F.3d 248.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1995. Petitions for rehearing were denied on September 18, 1995. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on December 18, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns a rail abandonment proceeding before the former Interstate Commerce Commission (ICC).[1] On January 25, 1993, petitioner CSX Transportation, Inc. (CSX) filed a "notice of exemption" to abandon an "out-of-service" rail line that it had operated between Bloomington and Bedford, Indiana. See Pet. App. 18a-20a. On February 1, 1993, petitioner Monroe County Parks and Recreation Department (Monroe County) notified the ICC that it was interested in using the line for interim trail use under Section 208 of the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 48, 16 U.S.C. 1247(d) (Trails Act).[2] Monroe

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[1] On December 29, 1995, the President signed Pub. L. No. 104-88, 109 Stat. 803, "The ICC Termination Act of 1995" (ICCTA). That statute abolished the ICC and transferred many of its rail functions to the Surface Transportation Board (STB), effective January 1, 1996. However, the new Act does not affect suits commenced before its effective date where, as here, the suit involves functions transferred to the STB. See ICCTA Section 204(c)(2). The functions at issue in this proceeding, which were formerly performed by the ICC, are now vested in the STB by virtue of 49 U.S.C. 10903 and 10905, as reenacted in the ICCTA. Section 204(a) of the ICCTA provides that all regulations previously issued by the ICC "shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the" STB. This brief will refer to the ICC and to the provisions of the Interstate Commerce Act as they existed prior to the enactment of the ICCTA. However, we request that the records in this case be changed to substitute the STB for the ICC as a respondent in this proceeding.

[2] The Trails Act directs the Commission not to permit abandonment where a State, political subdivision, or qualified private organization is prepared to assume full responsibility

County requested that the ICC impose a public use condition under 49 U.S.C. 10906[3] to give it additional time to pursue a trail use agreement with CSX. See Pet. App. 3a, 41a. On February 16, 1993, the ICC published a notice of the abandonment proposal in the *Federal Register*. See 58 Fed. Reg. 8635 (1993). The notice specifically alerted the public that (1) requests for trail use and/or public use conditions could be made and (2) environmental, historic preservation,

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for management of such rights-of-way and for any legal liability arising out of such "interim use" as a trail; that policy serves "to preserve established railroad rights-of-way for future reactivation of rail service." 16 U.S.C. 1247(d). Section 1247(d) provides that interim trail use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." See *Preseault* v. *ICC*, 494 U.S. 1, 6-9 (1990). The Trails Act was not changed in the ICCTA.

[3] Former 49 U.S.C. 10906 (1988) provided in pertinent part:

> When the [ICC] finds [that abandonment or discontinuance is to be permitted], the Commission shall find further whether the rail properties that are involved in the proposed abandonment * * * are suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

The ICCTA public use provision (Section 10905) is similar but adds that proposals for "continued rail operations" will take priority.

public use and/or trail use conditions would be imposed, where appropriate, in a subsequent decision. The authority to abandon was scheduled to take effect in March 1993, unless stayed pending reconsideration. See Pet. App. 18a-20a.

In a submission dated March 16, 1993, CSX informed the ICC that it had decided not to negotiate a trail use agreement with Monroe County. On March 18, 1993, the ICC issued a decision (served on March 22), indicating that it was unable to impose a trail use condition at that time, due to CSX's unwillingness to consider trail use. See Pet. App. 41a-44a.[4] To permit additional time for consideration of public use options, the ICC imposed a 180-day public use condition. *Ibid.* On March 23, 1993, CSX wrote to the ICC indicating that it had "abandoned" the line. See *id.* at 4a. Nevertheless, CSX and Monroe County negotiated for the next several months concerning possible use of the right-of-way as a trail. See *id.* at 22a-23a. On September 14, 1993, just before the 180-day period expired, CSX again wrote to the ICC, stating that it had reached an agreement with Monroe County for interim trail use. See *id.* at 5a. CSX asked the ICC to reopen the abandonment proceeding and to issue a Notice of Interim Trail Use (NITU) to permit the trail use. See *id.* at 4a-5a.[5]

By decision served on September 27, 1993, the ICC imposed the trail condition. Pet. App. 21a-24a. In its

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[4] Trail conditions may not be imposed without the full consent of the railroad. See *National Wildlife Federation* v. *ICC*, 850 F.2d 694, 699-702 (D.C. Cir. 1988).

[5] The ICC issues an NITU when a prospective trail user has requested an interim trail use arrangement and the carrier has indicated its willingness to negotiate such an arrangement. See *Preseault*, 494 U.S. at 7 n. 5.

decision, the ICC found that it retained authority to impose a trail condition because it had maintained jurisdiction over the property while the public use condition was in force. *Id.* at 23a. No petition for judicial review of that decision was filed within the 60-day period established by statute for the initiation of judicial challenges to ICC decisions.[6]

On November 8, 1993, 43 days after service of the ICC order imposing the trail condition, 18 landowners (including Victor Oolitic Stone Company, one of the petitioners below), purporting to act for themselves and others similarly situated, moved for administrative reconsideration of the ICC order. Pet. App. 37a-40a.[7] The motion for reconsideration was untimely under ICC rules, which allow a maximum of 40 days for the filing of motions seeking reconsideration of rail abandonment decisions. 49 C.F.R. 1115.3; see Pet. App. 6a-7a. The ICC denied reconsideration by decision issued on March 22, 1994. *Id.* at 28a-36a. The landowners then petitioned for review of the March 22 refusal to reopen the proceeding.

2. On review of the refusal to reopen, the court of appeals reversed the ICC's decision to impose a trail condition. Pet. App. 1a-13a. The court first rejected the intervenors' challenge to its jurisdiction. *Id.* at 6a-9a. The court acknowledged the jurisdictional

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[6] Under 28 U.S.C. 2344, a provision of the Hobbs Act, any "party aggrieved by the final order [of the ICC or, now, the STB] may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies."

[7] The ICC also received a number of letter protests in late September 1993. Because those letters were not served on parties to the proceeding and omitted required elements of motions for reconsideration, they were added to the ICC file as letter protests. See Pet. App. 25a-27a.

limitation imposed by *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (*Locomotive Engineers*), which held that where a party seeks reconsideration of a prior agency order on the ground of "material error," the agency's denial of reconsideration is not subject to judicial review.[8] The court of appeals distinguished *Locomotive Engineers* on the ground that the landowners' petition to reopen the ICC's abandonment decision had been based on "non-pretextual grounds of new matter or changed circumstances, and not merely on [allegations of] material error in the original agency decision." Pet. App. 8a (citing *Locomotive Engineers*, 482 U.S. at 281).

The court of appeals next considered the landowners' challenge to the ICC's authority to impose a trail condition based on the agreement reached between CSX and Monroe County. The court again found for the landowners, ruling that the ICC's jurisdiction had ended in March 1993, when CSX initially claimed to have abandoned the disputed rail line. The court determined that neither the 180-day public use condition imposed under 49 U.S.C. 10906 nor any other provision of the ICC's March 18 order

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[8] As the court of appeals observed (Pet. App. 6a), the petition for review here, filed May 19, 1994, was well outside the 60-day period established by 28 U.S.C. 2344 for seeking review of the ICC's September 27, 1993, decision to issue an NITU. It was, however, filed within 60 days of the Commission's March 22, 1994, order denying the landowners' motion for reconsideration.

had limited CSX's authority to consummate abandonment. Pet. App. 9a-13a.[9]

ARGUMENT

We agree with petitioners that this case was wrongly decided by the court of appeals. The court misapplied this Court's decision in *Locomotive Engineers* and misconstrued 49 U.S.C. 10906 (now 49 U.S.C. 10905). Further review of the issues raised here, however, does not appear warranted at this time.

1. The court of appeals erred in ruling that it had jurisdiction to review the ICC's decision.[10] This Court in *Locomotive Engineers* distinguished between an agency's denial of a petition to reopen based upon a claim of "'material error' in the original agency decision" (which is not judicially reviewable) and denial of a petition to reopen based upon a claim of "new evidence or changed circumstances" (which is subject to judicial review). 482 U.S. at 278-279. Acknowledging that "the question may be a close one" (Pet. App. 9a), the court of appeals ruled (*id.* at 8a) that the landowners presented "new material" within the meaning of *Locomotive Engineers* in their petition for reconsideration. That conclusion was incorrect. The only argument for reconsideration presented in the landowners' November 8, 1993, motion to reconsider concerned the ICC's allegedly erroneous assertion of authority to impose a trail

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[9] An authorized abandonment, once fully exercised or "consummated," removes the line from the national transportation system. See *Preseault*, 494 U.S. at 5-6 n. 3.

[10] Although the government did not contest the court of appeals' jurisdiction in its brief to the court of appeals panel, see Gov't C.A. Br. 1, we now agree with petitioners that the court lacked jurisdiction.

condition after CSX had informed the ICC that it had "abandoned its common carrier obligations in the railroad corridor on or about March 19, 1993." *Id.* at 38a. Thus, the petition for reconsideration raised neither new evidence nor changed circumstances; it simply alleged that the ICC's decision to impose a trail condition was unlawful *at the time it was made.* Under *Locomotive Engineers*, the petition for review should therefore have been dismissed.

The court of appeals concluded that "the Commission was in fact presented with new material accompanying the motion to reopen. Specifically, [the landowners] asserted before the Commission that they were denied the opportunity to submit protests, arguing that CSX's request to reopen the proceeding was made beyond the Commission's procedural deadlines to file protests, and that [the landowners] were unaware of the filing of the CSX motion." Pet. App. 7a-8a (footnote omitted). Even if we assume that an interested party's belated awareness that a matter is before an agency might sometimes constitute "new material" or "changed circumstances" within the meaning of *Locomotive Engineers*, the court of appeals erred in exercising jurisdiction here. The ICC's February 16, 1993, *Federal Register* notice specifically alerted the interested public that "trail use\rail banking conditions could be imposed in a later decision." Pet. App. 20a.[11] The Commission's regula-

[11] It is well settled that publication in the *Federal Register* provides legally sufficient notice to all interested or affected persons, regardless of actual knowledge or hardship resulting from ignorance. See, *e.g.*, *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986) (*Federal Register* notice adequate to publicize the availability of certain low interest loans); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947) (wheat crop insur-

tions provide that "[i]nterested persons may become parties to an abandonment or discontinuance proceeding by filing written comments or protests with the Commission." 49 C.F.R. 1152.25(a). Those regulations also require that "[e]very document filed with the Commission" must be served "upon all parties to the proceeding." 49 C.F.R. 1104.12(a). Having declined to become parties to the abandonment proceeding, the landowners should not have been permitted to invoke their belated awareness of CSX's September 14, 1993, filing as "new material" or a "changed circumstance."

Even if the belated discovery of the September 14, 1993, filing were deemed to be reasonable, moreover, the landowners had ample opportunities to protect their rights. A *timely* petition for reconsideration would have tolled the time for seeking judicial review of the September 27, 1993, NITU itself.[12] See *Locomotive Engineers*, 482 U.S. at 279, 284. Alternatively, the landowners might have sought judicial review within the 60-day period after the September 27, 1993, NITU, since the filing of a request for agency recon-

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ance regulations were binding after insured's *Federal Register* publication regardless of actual knowledge of the regulations). Accord 44 U.S.C. 1507 (publication in *Federal Register* "is sufficient to give notice of the contents of the document to a person subject to or affected by it"); *Friends of Sierra RR* v. *ICC*, 881 F.2d 663, 667-668 (9th Cir. 1989), (*Federal Register* notice legally sufficient in ICC exempt abandonment proceeding), cert. denied, 493 U.S. 1093 (1990).

[12] The motion for reconsideration stated that the relevant events "were only recently discovered by the Class of adjacent property owners," Pet. App. 39a, but did not assert that the information had been discovered so "recently" as to preclude timely filing of a petition for reconsideration.

sideration is not a prerequisite to a petition for judicial review. See *id.* at 284-285. The need to seek judicial review of the agency's refusal to reopen arose only because the landowners failed to exercise either of those options.

Despite the court of appeals' error, there appears to be no compelling need for this Court's review at the present time. The practical effect of the court's error is likely to be limited. The court of appeals cited and purported to apply *Locomotive Engineers*. Its misapplication of *Locomotive Engineers* was based on its evaluation of the facts presented to it regarding the abandonment of this particular railroad line. See Pet. App. 7a-8a.

2. The court of appeals also erred in holding that the ICC's imposition of a public use condition under Section 10906 did not prevent the railroad from abandoning the disputed line. Since its enactment in 1976, Section 10906 has been an important tool in providing time for interested parties to attempt to acquire rail rights-of-way for public purposes through arm's length negotiations. Since 1986, the ICC has interpreted Section 10906 to permit it to bar the railroad from disposing of the right-of-way for up to 180 days, pending voluntary negotiations for interim trail use.[13] The court of appeals erred in substituting its own interpretation of Section 10906 for the reasonable, long-standing interpretation of the agency charged with administering the statute.

Contrary to the court of appeals' view, the language of Section 10906 is broad enough to support the ICC's

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[13] *Rail Abandonments - Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 609 (1986) (Section 10906 applies to easements as well as property owned in fee by the railroad).

construction. Under Section 10906, if the ICC authorizes an abandonment, it must determine whether the rail properties "are suitable for use for public purposes, including * * * recreation." If the ICC determines that use for public purposes may be suitable, the ICC has the authority to bar the sale, lease, exchange, or any other disposition of the rail properties involved for up to 180 days, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

Thus, Section 10906 permits the ICC to prohibit *any* disposal of the rail properties (*i.e.*, to require the railroad to keep the transportation corridor intact) for up to 180 days pending negotiations for public use (including trail or other recreational use).[14] Nothing in the language of Section 10906 compels the court of appeals' conclusion that public use conditions cannot forestall legal abandonment of a rail line where reversionary interests may be involved. Unlike *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633-634 (1984), which held that the consummation of *unconditioned* abandonment authority removes the property from the ICC's control, after which it may be dealt with by state and local jurisdictions in the same manner as other property within their borders, the property at issue

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[14] Indeed, this is confirmed by the legislative history of the ICCTA, which explains (H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 181-182 (1995)) (emphasis added):

> In replacing former Section 10906, this provision retains existing agency authority to examine the possibility that a line proposed for abandonment may be suitable for alternative public uses. *Abandonment may be postponed for up to 6 months to allow for the pursuit of such alternatives.*

in this proceeding was the subject of an unexpired public use condition.

Notwithstanding the defect in the court's construction of Section 10906, we see no compelling need for further review at this time. The court's ruling, which is largely fact-bound (see Pet. App. 11a-12a), does not present an issue of sufficient general importance to warrant review by this Court at this point. The impact of the court's ruling likely will be limited because parties seeking to ensure interim trail use have an alternative remedy: invoking the Trails Act *during* the abandonment proceeding. Under the regulatory procedures implementing 16 U.S.C. 1247(d), when a prospective trail user requests an interim trail use arrangement and the carrier indicates its willingness to negotiate such an arrangement, the ICC (now the STB, see note 1, *supra*) issues an NITU. 49 C.F.R. 1152.29(d). When an NITU is issued, the parties have a 180-day period in which to negotiate an interim trail use arrangement. If no agreement is reached, the NITU automatically con–verts into an effective certificate authorizing abandonment. In turn, if a trail use agreement is reached, it is automatically authorized by the NITU. Moreover, a railroad wishing to consider trail use can avoid the effect of the court of appeals' decision by simply refraining from submitting a letter declaring that it has abandoned the line of railroad. See Pet. App. 11a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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CSX TRANSPORTATION COMPANY and
MONROE COUNTY, INDIANA,

Petitioners,

vs.

FRITSCH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petitioners CSX Transportation, Inc. and Monroe County, Indiana, reiterate their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

FURTHER REASONS FOR GRANTING THE WRIT

1. Appellate jurisdiction under *Brotherhood of Locomotive Engineers*. The first issue in this case is whether the Court of Appeals had jurisdiction to review the decision of the Interstate Commerce Commission below. The ICC decision refused to reopen an administratively final decision. Under *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 622 (1984), no review was possible. ICC's successor (the Surface Transportation Board) and the United States categorically state that the lower court erred in finding jurisdiction. Respondents Fritsch, *et al.*, do not even attempt to support the rationale employed by the lower court in support of its jurisdiction. Respondents Fritsch, *et al.*, instead assert that Monroe County raised new information (namely, the condition of the corridor). This is absurd. Monroe County reiterated to the ICC exactly what we (and CSX) said to the ICC when we requested ICC to issue the Notice of Interim Trail Use (NITU) in the first instance. As the Federal Respondents state in their Brief, there was no "new information" justifying judicial review here.

2. ICC jurisdiction to railbank. The second issue is whether ICC retained jurisdiction to railbank the corridor by reason of a public use condition imposed pursuant to 49 U.S.C. § 10906. CSX and Monroe County agree with the Federal Respondents that the lower court clearly erred on this issue as well.

3. Significance for certiorari. The federal Respondents basically contend that the lower court's ruling was so

aberrational and contrary to law that it will hopefully be ignored. This is more an argument for summary reversal than for declining to review the decision. There is no question but that the court below has opened a gaping hole in the finality of federal agency decisions, essentially eviscerating *ICC v. Brotherhood of Locomotive Engineers, supra.*

Monroe County has made a substantial investment in the corridor and an even greater investment in planning a trail on the corridor. The erroneous lower court decision unquestionably jeopardizes a $1.2 million grant, over $200,000 in funds for engineering and related work already completed, plus equivalent funds for other expenses and overheads.

Law is supposed to lead to dependable results; like cases are to be treated alike; precedent and long standing agency practice are to be accorded respect and weight. Law is not supposed to be the whim of a particular panel on a particular day. It is not for the courts to "preempt congressional action by judicial decree[] . . ." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 195 (1978).

It is difficult to comprehend the federal Respondents' view that a decision which is so obviously contrary to applicable precedent and which is obviously wrong on all issues is nonetheless not appropriate for review. This is especially so when its results are so unfair and upsetting to expectations of the parties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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